Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1994

Don Fuller, pro se

Petitioner,

vs.

Secretary of Defense, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED FOR REVIEW

ARE THERE TWO CLASSES OF AMERICAN CITIZENS?

Does the Constitution of the United States, as amended, guarantee - during peacetime - those humans, in any form, of the uniformed services of the Armed Forces of America the **equivalent** constitutional protections regarding employment as are guaranteed to the citizens not in the uniformed services?

TEMPORARY JUDICIAL OVERSIGHT OF THE UNITED STATES NAVY DEPARTMENT

Does the Constitution of the United States of America permit or require Article III courts to temporarily oversee peacetime employment decisions and actions of DOD civilian and military leaders exercising poor judgement and diminished integrity when America's national security capability is compromised and the Constitutional and civil rights of uniformed service members are intentionally and systemically violated?

INJURY TO REPUTATION AS A "LIBERTY" AND "PROPERTY RIGHT"

Is there an unconstitutional deprivation of liberty in violation of the Due Process Clause and the equal protections guaranteed by the Fifth Amendment when individual federal government officials are permitted to intentionally defame and repeatedly and maliciously injure an individual's reputation and then assert the **Feres Doctrine** to thereby deprive the victim of any opportunity for a sufficient process to protect the individual's interest in his/her reputation?

"INDIVIDUAL" FEDERAL EMPLOYEE'S ACCOUNTABILITY FOR BIVENS TYPE MISCONDUCT

When the United States Government has waived sovereign immunity under the Federal Tort Claims Act for negligent acts, may individual DOD employees who cause intentional harm be shielded from **Bivens** Claims by asserting the defense of the **Feres** Doctrine so that a victim who is not receiving any IRR pay and who was not subject to any military orders is denied a remedy and

forum for determining damages for deprivation of civilian associational and employment rights, damage to professional reputation, and the taking of property in violation of the Due Process Clause and the equal protections guaranteed by the Fifth Amendment?

THE *FERES* DECISION

When the United States Government has waived sovereign immunity under the Federal Tort Claims Act, may it be shielded by the ***Feres*** Doctrine from damages caused by tortuous actions of its employees or agents which cause injury to a civilian attorney acting in furtherance of his professional responsibilities to his civilian clients and for damage also caused to the professional reputation of an all-volunteer military reservist who is not receiving any reserve pay and is not subject to any orders requiring service as a uniformed member of the Armed Services?

FUTILE EXHAUSTION OF REMEDIES

When the decisions and integrity of former Secretary of the Navy Garrett and acting Secretary of the Navy Kelso are severely questioned by the President or Congress prior to their resignations and there is pervasive evidence of systemic failure and abuse of the Department of the Navy personnel employment and medical procedures such that a full-time civilian attorney and part-time all-volunteer non-paid uniformed service member has suffered grave damage to his liberty and property rights guaranteed by the Fifth Amendment, must there be an exhaustion of remedies to the Board of Corrections for Naval Records before seeking judicial relief in a Article III Court?

THE UCMJ IN THE CIVILIAN COMMUNITY?

Does the UCMJ apply to a physically injured, unpaid, off-duty, not subject to either military orders or discipline Individual Ready Reservist concerning an alleged, but never committed or proven, petty

criminal matter upon which all allegations were legally and ethically resolved in favor of the civilian practicing attorney who after receiving a face to face death threat in retaliation for his reporting Defense Investigative Service misconduct had purposely acted to obtain access to a judicial forum, acted to create a public record of the misconduct, and received subpoena powers in the civilian community so as to expose criminal wrongdoing by Defense Investigative Service personnel who were repeatedly and viciously violating the Constitutional and civil rights of civilian defense contractor personnel?

ARTICLE 134 OF THE UNIFORM CODE OF MILITARY JUSTICE

Is Article 134 of the Uniform Code of Military Justice unconstitutional due to its vagueness, its arbitrary and capricious application, and its propensity for furthering unlawful command influence?

SECRETARY OF THE NAVY INSTRUCTION 1920.6 AND MARINE CORPS ORDER P 1900.16

Do SECNAVINST 1920.6 and MARINE CORPS ORDER P 1900.16 unconstitutionally permit the Secretary of the Navy and the Commandant of the Marine Corps to use a panel of officers rather than a administrative law judge to arbitrarily deprive military personnel of liberty and property rights guaranteed by the Due Process Clause and the equal protections of the Fifth Amendment; to arbitrarily use UCMJ Article 134 in an employment administrative hearing; and to "deem" that a purely military offense has been "committed" in the civilian community by a non-paid, not under military orders IRR reservist; to ignore the presumption of innocence and no conviction; to ignore the Minnesota Lawyer's Board of Professional Responsibility determination of no unethical misconduct; to ignore a "good faith" exculpatory polygraph but to consider "anonymous phone tips"?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, Don B. Fuller, Pro Se.

Respondents are as follows:

Secretary of Defense of the United States of America

Secretary of the Navy of the United States of America

The Commandant of the United States Marine Corps

The Director, Marine Corps Reserve Center

The Commanding General, Fourth Marine Division, United States Marine Corps

---

The following public officials were named in their official capacities in the proposed Amended Complaint filed in the United States District Court for the District of Minnesota in which Petitioner sought Declaratory Judgment regarding restoration to duty as a Marine Corps Reserve Officer.

Secretary of Defense of the United States of America

Secretary of the Navy of the United States of America

The following individuals were named as additional and indispensable parties in Petitioner's proposed Amended Complaint filed in the United States District Court for the District of Minnesota in which Petitioner sought punitive and treble money damages for **Bivens** claims. The Petitioner's motion for leave to amend the Complaint was denied partially for the reasons that pursuing a **Bivens** claim would be "futile" under existing circumstances due to the Court's decision in **Feres**.

Robert L. Turay, Former Twin Cities DIS Field Chief, now resigned

Lee Olson, Former Twin Cities DIS agent, now resigned

Lee R. Sampson, Twin Cities DIS Agent

Robert Simpson, Twin Cities DIS Agent

Lee Haurilick, Twin Cities DIS Agent

Robert Small, AUSA

Lt. Alicia Connolly, United States Navy lawyer

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F. Appellate Court Affidavit re Illegal DIS Surveillance, Miscarriage of Baby, and Bivens Misconduct by DIS Agents

G. UCMJ Article 134

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I. MARCORPSEP MCO P 1900.16 - Relevant Section

J. Request for Admissions of Admiral Frank Kelso, (acting) Secretary of the Navy

K. H. Lawrence Garrett IV not processed for administrative discharge despite Article 15 findings of active duty use of marijuana, larceny, receipt of stolen property, soliciting another to steal and allegations of lying to NIS agents.

L. Administrative Delays Frustrate Due Process and Lead to Seeking Article III Court Review rather than Continue Exhausting Failed Administrative Process.

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NO. _____

IN THE UNITED STATES SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1994

DON FULLER, PRO SE, Petitioner

vs.

SECRETARY OF DEFENSE, et al Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Don Fuller, pro se, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the the United States Court of Appeals for the Eighth Circuit failure to consider the grave Constitutional issues presented by the Petitioner.

This case presents the Court with important Constitutional issues concerning:

(1) the Constitutional rights of American humans voluntarily serving in the all-volunteer and reserve Armed Forces;

(2) whether America is a nation of reasoned law or a nation where some men are above the law;

(3) the Court's responsibility to its citizens in uniform and to our democratic form of government as initially envisioned by the drafters of the Constitution and then eloquently interpreted by Chief Justice John Marshall in **Marbury v. Madison**, 1 Cranch 137 (U.S. 1803).

How long can this nation expect private citizens to volunteer to serve our country in uniform on active duty and in the reserves; to provide for our collective national security; and to continue to defend the Constitution when the few who do volunteer are subjected to morbid, disparate,

and unconstitutional treatment without remedies, as follows:

(1) Intentional and systemic deprivation of Constitutional rights of federal, military and civilian defense contractor employees working in a "extremely hostile work environment" which has:

a. **Permitted** uniformed service members to gang rape enlisted males using instruments but their commanding officers were still promoted to "flag or general officer status": and

b. **Permitted** the chief labor lawyer of a major military base (more than 50,000 employees) to continue on active duty despite illegally terminating an older Phi Beta Kappa female secretary so he could hire a younger blonde woman who he stated would provide him with sex in his office; and

c. **Permitted** a senior active duty military recruiting officer serving in the civilian community to remain on active duty and be honored despite his continued public reference to African-Americans as "Spear Chuckers", "Orangutans" and "Gorillas in the Mist"; and

d. **Permits** "blanket parties" in which junior enlisted personnel are singled out for punishment and then they are anonymously and viciously beaten in their beds after being awakened. No one is **ever** held accountable.

(2) Impermissible and systemic retaliation and retribution for the civilian attorney Petitioner reporting the following extreme acts of employment misconduct by Department of Defense (DOD) personnel:

a. Intentional deprivation of liberty by purposefully destroying employee's reputations and using the military psychiatric community to undermine the validity of otherwise accurate "whistle blower's" reports; and

b. Intentional falsification and fabrication of employment records which affect military careers, promotions, retention and the quality of eventual civilian employment; and

c. Harassment and intimidation of DOD and civilian contractor personnel using impermissible and illegal domestic surveillance of homes like in a "secret police force";

d. Unauthorized and illegal investigations and obstruction of justice by threatening professional and personal harm, including death,

of other federal employees cooperating with the Justice Department to expose the wrongdoing; and

e. Illegal arms and equipment sales for profit by paid federal employees prior to and during the war with Iraq.

(3) Intentional **Bivens** violations by individual federal employees, operating under "color of law" who now seek to shield themselves from accountability by invoking the **Feres Doctrine** against Petitioner who is a civilian attorney.

(4) Capricious use of the vague UCMJ Article 134 and the administrative discharge procedures **to favor active duty** personnel including Navy Admiral Frank Kelso and the son of the Secretary of the Navy and **to harm reservists**, to wit;

a. Intentional **nonuse** of Article 134 of the UCMJ and SECNAVINST 1920.6

in active duty TAILHOOK cases as best illustrated by the promotion and award of an increased joint and survivor pension to Admiral Frank Kelso and his spouse.

b. Intentional **use** of Article 134 of the UCMJ and SECNAVINST 1920.6, against the Individual Ready Reserve Petitioner despite the findings of an American civilian court and the lawyer's professional board that Petitioner had not committed any illegal or even unethical misconduct in the civilian community while acting solely as a civilian attorney.

c. Permitting H. Lawrence Garrett III and Admiral Frank Kelso [acting as the Secretary of the Navy (SECNAV) and the ("acting" SECNAV), respectively], to unlawfully take official action to separate Colonel

Fuller from the Marine Corps Reserves after reducing him in grade from Colonel to Lt. Colonel and thereby also causing Petitioner to suffer a lifetime reduction in pension benefits.

d. Permitting the Navy Department to reach into the civilian community and assert jurisdiction over a non-paid, non-drilling, not on duty, physically disqualified IRR reservist and "**deem**" Petitioner's civilian behavior to somehow constitute "disorders and neglects to the prejudice of good order and discipline in the armed forces", despite Petitioner providing an exculpatory polygraph and substantial witness affidavits to demonstrate that Petitioner only appeared to be in trouble in the civilian community to force the

issue of the repeated and systemic DOD DIS abuse and death threats off the streets where DIS agents could not be held accountable and into a court of law where DIS agents could someday be subpoened and also held accountable.

The Egregious Bivens Misconduct is Capable of Repetition Yet Evading Review

The intentional egregious misconduct of DOD personnel and the systemic failures within DOD caused the harm inflicted upon the Petitioner which unfortunately although not unique is capable of repetition as the military records of Colonel Fuller have been greatly fabricated by and illegally disseminated into the civilian community and to unlawfully influence "administrative hearing" by DIS agents. The fabricated records will continue to cause irreparable harm for the remainder of Don Fuller's life.

The DOD and DIS agents first threatened Don Fuller with professional and personal harm and then engaged in intentional **Bivens**-type misconduct over a period of years. [Separate Appendix Exhibits C through F].

The continued failure to hold accountable those "individuals" acting under color of law but beyond the law undermines national defense capability, daily undermines the quality of America's national defense and permits unconstitutional misconduct to permeate the Navy Department. [Appendix Exhibits C, D, E, F, J, and K].

Bivens-type misconduct also deprives all-volunteer active duty and reserve uniformed personnel, DOD civilian employees and the civilian defense contractor workforce of their Constitutional, civil and human rights without providing any effective forum or remedy for recovery of substantial harm. [Appendix Exhibits A through F].

THE PRAYER FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which:

(1) failed to consider any of the Constitutional questions presented by the Petitioner:

(2) failed to review the "discretionary" actions of former Secretary of the Navy H. Lawrence Garrett and Admiral Frank Kelso or the senior hearing officer at the Marine Corps administrative hearing who threw a pencil at the Petitioner as Petitioner testified: and,

(3) assumed that former Secretary Garrett and acting Secretary Kelso acted properly and in accordance with the rules of their public office; and,

(4) failed to appreciate the inability of the Board of Corrections of Naval Records (BCNR) to consider or determine "grave" Constitutional issues and the

Eighth Circuit panel thereby failed to properly follow the Eighth Circuit's decision in Horn v. Schlesinger, 514 F. 2d 549 (CA8 1975).

(5) failed to reverse the District Court's opinion which:

(a) **failed to consider the Constitutional questions** presented by the Petitioner;

(b) dismissed the Petitioner's Complaint;

(c) required the Petitioner to exhaust administrative remedies before the (BCNR) which cannot consider nor decide Constitutional questions affecting the associational and employment rights of the civilian attorney and which would force the Petitioner to engage in a "futile effort"; and which

(c) denied the Petitioner the right to amend the Complaint to assert

"individual" **Bivens** claims based on the conduct of "individuals" who intentionally and maliciously violated the Constitutional, civil and employment rights of the Petitioner who was forcefully acting as a "lightening rod" to redirect all DIS abuse and who "zealously" defended and protected civilian defense contractor employees who were suffering extreme depravation of their own Constitutional and employment rights and suffered the effects of extreme emotional distress, including the miscarriage of a fetus;

(d) incorrectly determined that Petitioner suffered only injuries incident to his service when Petitioner could not be serving due to his status as a non-paid, not

physically qualified, not under orders IRR reservist not on any type of duty;

(e) failed to appreciate the extent of the damage to Petitioner's civilian law practice as DIS agents substantially interfered with the attorney client relationship and engaged in unlawful retaliation when Petitioner first reported their abuse "within the system"..

The Petitioner asserts that Constitutional issues not considered by the District Court or the Eighth Circuit Court of Appeals are never "moot" and hearing by the United States Supreme Court is requested.

The Opinions of the Eighth Circuit and the District Court correctly state that Petitioner, in his amended complaint, sought restoration to duty as a Marine Corps Reserve Colonel and this is an issue which remains undecided.

Systemic Harm to Individuals in Administrative Proceedings and Art. I Section 8 Courts.

Until senior civilian and military leaders are held accountable Petitioner argues that such misconduct is certainly capable of repetition yet evading review.

Appendix K contains quotes from a decision of the United States Navy-Marine Corps Court of Military Review 93-00141 Published 13 June 1994. The case discussed the favored status of Yeoman Seaman [YNSM] H. Lawrence Garrett, IV, who was <u>not processed for administrative discharge</u> despite being found guilty of active-duty use of marijuana, larceny of food and gasoline, receipt of stolen property, and soliciting another to steal.

YNSN Garrett is son of the then-Secretary of the Navy H. Lawrence Garrett III who was asked to resign his office by President Bush. The Court said:

> In the case of the son of the Secretary of the Navy, "...the military justice process was

infected throughout by senior naval officers who considered the accused rather than what he had done."

"We do find that RADM Williams, due to his close personal relationship with the Secretary, engaged in actions of favoritism towards [the Secretary's son] to such an extent that NIS agents believed he might have been obstructing justice."

"Preferential treatment of a suspect based on his family relationship to a high-ranking officer or civilian has no place in any reputable justice system."

"....[T]he integrity and fairness of the military justice system cannot accept such a result."

The Secretary's son, "...was not processed for administrative discharge following the Article 15 proceeding. Not only is it uncommon, but it is extraordinary that a Sailor could be found to have used marijuana repeatedly, to have stolen property using stolen credit cards taken from a Navy mail room, to have received stolen property by using those cards, to have asked another Sailor to steal a vacuum cleaner by using another Sailor's stolen credit card, and to have lied to NIS agents under oath and then be retained on active duty without being processed for discharge. In this case, that result is not inexplicable. Based on out experience, we state with confidence that, absent

extraordinary circumstances, any other Sailor in the U. S. Navy who faced such charges would have been tried by a court-martial.

"In summary, we find that YNSN's transfer was based solely on his status as the son of the Secretary. The **decision** that his offenses should be disposed of at an Article 15 proceeding and **that he would not be processed for administrative discharge thereafter was based on that same status**.

The need for temporary judicial oversight of the Department of the Navy is compelling.

The well researched U. S. News & World Report article of November 9, 1992 pages 46-62 [included as a part of the District and Appellate Court record] corroborates that the Article I Section 8 Naval Justice system is presently incapable of protecting the Constitutional rights of individual service members.

The U. S. News & World Report report article contains admissions attributed to Navy admirals and a former SECNAV that fabricated reports and "anonymous phone tips"

are often used to damage the military reputations of military personnel.

Those records and the resulting conditions of separation from service thereafter affect the quality of civilian employment.

The actions of the SECNAV and other DOD personnel which reached out and harmed Don Fuller in his civilian law practice and interfered with his civilian attorney-client relationships and the defense of his civilian law clients thereafter also denied Don Fuller a fair and impartial hearing process which deprived Petitioner of Constitutional rights guaranteed by the Fifth Amendment.

NO WITNESSES, EVER

No witness has ever appeared against the Petitioner or been questioned under oath in any hearing or court of law. Still, the District Court and Eighth Circuit opinions make reference to "facts" which are only

traceable to or have their genesis from a "anonymous phone tipster" and greatly fictionalized DIS writings.

The record of Petitioner and opinions concerning his lifetime character, his moral courage and his potential for future military service, are summarized in Appendix Exhibits C, D, and E.

The only allegations against Don Fuller which were considered by the administrative hearing board were contained in two civilian court records. Don Fuller responded to accusations by consenting to an exculpatory polygraph which demonstrated no deception and confirmed that despite the allegations, he had carefully avoided the conduct described in the allegations.

Even the original Complaint in civilian court admitted that Don Fuller had not been in any contact with an ex-friend. She admitted that she had been advised by a prosecuting attorney to file the complaint

after Don Fuller had documented and reported substantial unethical misconduct by the Eden Prairie assistant city attorney which included lying to a judge.

There exists within DOD an outdated and unconstitutional employment system which denies members of the uniformed services of the Armed Forces the rights guaranteed by the Due Process Clause and equal protection of the Fifth Amendment.

NO PROCEDURAL DUE PROCESS

Uniformed members of the Armed Forces do not receive procedural due process in many ways which include:

1. "Commander's influence" as to who is picked out for being "taken down" and who is to sit on the hearing panel:
2. Denial of a hearing before an administrative law judge whereas

civilian DOD employees are guaranteed such protection;

3. Reserve uniformed members of the Armed Forces have to pay their own way [without reimbursement] to distant hearings and to consult with an attorney whereas active duty military personnel receive pay, transportation and allowances and a nearby attorney to prepare for and attend the same non-due process hearings;

4. For a quarter (25 cents) anyone with a reason can become an "anonymous phone tipster" which triggers and engenders the DIS process of "fictionalized reports" and "ghost writings" which result in bogus military employment records and even court records due to the "business records" exception to the hearsay rule.

The absence of accountability and the denial of a remedy, encourages intentional degradation of the service member's reputation to bolster the military's contention that the individual was a non-performer. It encourages the issuance of military orders to see a military psychiatrist to "find something". It inhibits the Constitutional processes by which reputations could be rebuilt and employment records are corrected.

UNACCOUNTABLE MISCONDUCT AFTER "FERES"

The misapplication of the flawed **Feres Doctrine** which looks to the status of the victim to mechanically deny a remedy rather than holding the "individual" perpetrator accountable, engenders egregious behavior which is hereinafter briefly recounted:

> "Rape by flashlight of a junior enlisted male at his work station; wrongful termination of a secretary by the senior labor lawyer at a military base so that he could hire someone who would

give him head each afternoon at his desk; a mid-level military officer calling African-Americans "Spear Chuckers", "Orangutans" and "Gorillas of the Mist" and then receiving an award of some consequence at the end of tour despite there being a formal investigation; rape by shoe polish dauber of a junior enlisted male at his work station and his commanding officer is promoted to the grade of 2 star general; fictionalizing official employment records; ordering any grade personnel to see a psychiatrist when they report wrongdoing by senior personnel; retaliation for reporting that military personnel and DIS agents were selling illegal arms and equipment for profit before and during the war with Iraq; and promotion to the grade of 4 star Admiral and granting a $17,000.00 a year pay raise to Admiral Kelso who was accused of lying to a court-martial judge but who lacked the courage and integrity to initiate an investigation into the allegations or his own wrongdoing."

There is no legitimate governmental interest or rational basis for asserting that the federal or military workplace can be a safehaven for such unconstitutional and criminal misconduct toward any American citizen.

An individual does not cease to be a person nor should they forfeit their rights under the Fifth, Thirteenth, and Twenty-Seventh Amendments to the Constitution because he/she sometimes assumes a status as a member of America's Armed Forces or because he/she has taken an oath to voluntarily support the Constitution with his/her life, if need be.

It is accepted that the right or privacy must at times be somewhat curtailed as one serves in the military.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals and the District Court in and for the State of Minnesota appear as Exhibits A and B, respectively, in the separate Appendices accompanying this Petition. Neither opinion considered the Constitutional issues presented by the Petitioner.

JURISDICTION

The Court of Appeals Order and Judgment in this matter was filed on July 18, 1994. This Court's jurisdiction is sought under Title 28 U. S. C. 1254 (1) and pursuant to Supreme Court Rule 10 (a).

The courts of appeal of the United States have rendered decisions in conflict with each other on the issue of exhaustion of remedies within the administrative processes of the uniformed services of the United States Armed Forces; this Court's decision in **Feres** deprives the civilian Petitioner and all military personnel of rights inherent in the Due Process Clause and the equal protections guaranteed by the Fifth Amendment for damages resulting in **Bivens**' claims; article 134 of the UCMJ is so vague, arbitrary and applied capriciously that it is unconstitutional; and SECNAVINST 1920.6 and Marine Corps Order 1900.16 deny Petitioner and all military personnel of the rights guaranteed by the Fifth Amendment.

No administrative process or federal court has yet considered any of the Constitutional questions raised by Petitioner.

STANDING AND RIPENESS

This is a case about DOD and DIS personnel first threatening and then acting to inflict intentional harm on a civilian attorney in retaliation for his exposing their continued harassment of his clients. Petitioner, despite substantial threats, also correctly reported illegal arms and equipment sales for profit by federal employees before and during the war with Iraq.

DIS retaliation was first aimed at the civilian attorney-client relationship and involved harassment of clients and Petitioner in the civilian workplace.

A more detailed explanation of the extent of the abuse is contained in Appendix Exhibits C, D, E, and F. Cooperating DIS agents confirmed that the unofficial DIS

abuse included obstruction of justice, illegal domestic surveillance and severe employment and sexual harassment. Exhibit F documents that a female employee suffered a miscarriage after receiving a tongue lashing from DIS Field Chief Robert Turay.

Don Fuller knew that without official assistance, no one could long endure the DIS tortured treatment.

Don Fuller developed **"OPERATION FERRETT"** which was peaceful law-abiding plan to slowly expose and peel back the illegal actions and cover-up within DIS of DOD; to assure a public record of the wrong doing; to remove as many wrong doing DIS agents as possible; and to always give the Petitioner the continuing right of court appeal.

An essential part of the plan which was never understood by the DIS agents is that Petitioner's clients were the primary occurrence witnesses to DIS crimes and harassment whereas the Petitioner was only an

occurrence witness to the boasts to illegally close down a major defense contractor. The plan being developed to ensnare DIS and to free Petitioner's clients from further harm unfortunately required Petitioner to become a "lightening rod" to absorb, focus and concentrate all DIS abuse on Petitioner while the case proceeded through the administrative process and then the courts. [Appendix Exhibits C through F].

Don Fuller then proceeded to provide the Justice Department with the results of his own local investigation of DIS abuses. Despite the DIS promises of 40 to 70 indictments, none of Fuller's clients were ever indicted. They too, had done nothing wrong.

DIS began an impermissible and illegal investigation of Don Fuller based solely on an "anonymous phone tip". DIS continued the investigation and then illegally disseminated fabricated reports into a military

administrative hearing room and the civilian workplace and to civilian clients of the Petitioner in violation of DOD and DIS policies, regulations and directives.

The Navy Department then asserted jurisdiction over the civilian Don Fuller.

Don Fuller consented to examination by a psychiatrist and without reporting the information concerning the illegal arms sales before and during the war with Iraq, he was determined fit for full duty.

All hearings and medical examinations were conducted at a time when Petitioner was not ever serving as a Marine Corps Reserve officer due to non-pay, no orders, and civilian auto related injuries resulting in a physical disability.

Don Fuller then made additional reports, despite face to face threats of death. Each report was confirmed by his clients and known persons of integrity.

Fuller finally made the report that a DIS agent plus Minneapolis based Army reservists were illegally selling arms and equipment for profit before and during the war with Iraq.

After making such report and despite the earlier finding of the psychiatrist, Don Fuller was now found to be delusional by a Navy doctor. He went so far as to opine that Fuller should not even be practicing law in the civilian community.

Fuller remained calm and resolute and appealed the Navy doctor's finding which was inconsistent with standardized psychological testing (MMPI) results which had confirmed Don Fuller lifetime normalcy and which was contradictory to the memory testing and civilian medical and psychological reports.

On December 15, 1992, a Navy board overruled the Navy doctor and Fuller was again found totally fit for duty as a Marine Reserve officer.

Petitioner paid his own way to and all costs of preparation [without reimbursement] for all medical and administrative hearings which had been threatened by DIS agents to "take down" Petitioner. [Appendix Exhibits C, D and E].

At all hearings, Petitioner was the only certified judge in the room. Rules of evidence were ignored and the senior hearing officer preferred an "anonymous phone tip" from someone of questionable character to Petitioner's exculpatory polygraph. Despite all attempts at "blackmail on the cheap", Petitioner resolutely persisted to expose DIS abuse.

After Petitioner pointed out the quality of personal testimony and the process of cross-examination versus believing "anonymous phone tipsters" the senior member threw a pencil in disgust at the Petitioner.

Petitioner was personally explaining the prior service he had performed to various

general officers and how clients had benefitted from the law offices which Petitioner had led to an American Bar Association award for providing the best legal assistance in DOD, worldwide.

After the pen throwing and Petitioner's resulting and justifiable silence, the administrative hearing panel then "deemed" that the civilian Petitioner had "committed" a military offense in violation of Article 134 of the UCMJ.

The panel of officers then recommended reduction in rank and loss of substantial pension benefits in addition to the taking of liberty and property through damage to Petitioner's civilian reputation as a lawyer.

Despite repeated attempts, DIS withheld documents from Don Fuller which were needed by Petitioner to appeal.

After receiving another face to face death threat, Don Fuller filed a Complaint in District Court rather than to continue

fencing with DIS in the streets and in the administrative process. [Appendix Exhibit L].

As a result of the events which began during September, 1988, Don Fuller has a **"personal stake"** in the outcome of this controversy; he has suffered and will continue to suffer for the remainder of his lifetime the requisite **"injury in fact"** **"fairly traceable"** to the government action which is **"redressable"** by the judicial relief requested.

The soured culture in the United States Navy Department and the resulting diminished national defense capability combined with the deprivation of individual human, civil and Constitutional rights demonstrates that this case is ripe and not moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Ninth, Thirteenth, and Twenty Seventh Amendments to the Constitution; 10

USC 801 Article 134 of the Uniform Code of Military Justice [UCMJ]; SECNAVINST 1920.6 and MCO 1900.16.

STATEMENT OF THE CASE

As a civilian attorney, Petitioner reported systemic and sustained abuse by DIS agents in the Twin Cities. [Appendix Exhibit C through F]. Official reports of DIS harassment resulted in severe DIS retaliation. criminal misconduct, and face to face death threats. [Exhibits C through F].

Petitioner recognized part of the problem as actions of those protected by **Feres**. He devised **"OPERATION FERRETT"** to first obtain a forum for "salting" a public record for official reports theretofore being officially ignored; to then patiently expose DIS misconduct; to assure that DIS agents reported on themselves the documents "salted in the public records" and to finally argue for overruling **Feres**.

Petitioner quietly appeared to be in trouble. He then used the judicial process to seek systemic and lasting change rather than continuing to endure a process which even if he prevailed would only affect his status within a military system not committed to the basic principles upon which our freedom and democracy are grounded.

At all times, Petitioner was mindful of American history and appreciated the plight of our ancestors when they agreed to be bound by **The Mayflower Compact**; when they charted (**for some Americans**) the exodus from human bondage through **The Declaration of Independence**; when they consented to be governed through the rule of reasoned law as envisioned by **The Constitution of the United States of America**; and how they must have welcomed the enlightened leadership of Chief Justice Marshall in **Marbury v. Madison** who steadfastly determined the essential role of the Supreme Court and confirmed America as a

nation ruled by reasoned law than a nation ruled by men.

To insure and protect those sacred principles our ancestors had rallied and become galvanized to spend treasure and shed blood for the common good in the Revolutionary War as they sought to escape an intolerable form of rule by noblemen.

In the Civil War, brother fought against brother and father against son due to the temporary failure of reasoned law and judicial indiscretion in the case of **Dred Scott v. Sandford** 19 How. 393 (1857) in which Chief Justice Taney had determined that Dred Scott was property and not therefore human.

In World War II, America during a time of great international struggle emerged as a world leader and through the expenditure of American blood and treasure assured that classes and nations of people were freed from oppression.

Color became less of an issue to those who served together during time of war; however, as demonstrated in **Korematsu v. United States**, 323 U. S. 214 (1944) race was still an issue due to the perceived threat of collaboration with a worthy opponent.

The Korean War demonstrated America's need for a cost-effective military reserve force in which civilians return to serve under temporary military jurisdiction to defend America's citizens and their Constitution.

Through time and by the passage of the 13th and 27th Amendments, people of color and women were finally accepted as humans.

Unfortunately those who have fought and died to assure peace have not always been recognized as humans nor given the same Constitutional rights ensured to those who receive the benefits of the veteran's selfless protection.

"FERES" AND "STANLEY" DECISIONS CREATE A "SECOND CLASS" OF CITIZEN.

In **Brooks v. U. S.**, 337 U. S. 49 (1949) the Court recognized a veteran as human and a tort remedy was permitted to ensure compliance with the Due Process Clause of the Fifth Amendment.

The Court in **Feres v. United States**, 340 U. S. 135 (1951) distinguished and left untouched its decision in **Brooks**.

Feres is otherwise a decision not in accordance with reasoned law. The class of humans known as military personnel became a class of honorably serving victims without remedies against negligent and intentional tortfeasors.

Veterans receive a lesser form of Fifth, Thirteenth and Twenty-Seventh Constitutional rights than guaranteed to all other citizens, including convicted felons and drug dealers from any American city.

The Court in **Chappell v. Wallace**, 462 US 269 (1983) continued to accept military

arguments citing the special factors involved which effectively deprived enlisted military personnel of any system or remedy to protect their own Fifth Amendment due process rights.

The Court in United States v. Stanley, 483 US 669 (1987) continued to accept military arguments and effectively legitimized the right to use military personnel as lab animals through secret injections of LSD. The dissents of Justices Brennan, Marshall, Stevens and O'Connor demonstrate the need for and better approach to reasoned law and the acceptance of individual responsibility which was first judicially recognized in Linsman v. Wilkes, 12 Howard 390 (US 1849), as follows:

> "It must not be lost sight of ...that, while the chief agent of the government in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his official duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty,

> or any species of oppression, founded on considerations independent of public ends.
>
> The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office."

In **Bivens v. Six Unknown Agents of Federal Bureau of Narcotics**, 403 U. S. 388 (1971), Justice Brennan understood the potential for harm when federal agents act under color of law but beyond the law and a federal cause of action for damages was recognized consequent upon the agent's unconstitutional conduct. The dissents of Justices Burger and Black in **Bivens**, although understood, are not applicable in the military because it is the **Feres Doctrine** which bars recovery. Congress lacks the power to overturn and reverse any Supreme Court decision.

Despite the Fifth, Thirteenth and Twenty-Seventh Amendments, there are still two classes in America since the question of equality for men and women in uniform who

defend the Constitution of the United States against all enemies foreign and domestic has not yet been decided by reasoned law.

The wisdom of the common law and the decision in **Dinsman v Wilkes** had much to do with the days in America when our privileges of freedom were best assured by the acceptance of individual responsibility and accountability.

Petitioner urges the Court to review its decisions in **Feres**, **Bivens**, **Chappell**, and **Stanley**. Petitioner also urges the Court to expand the distinction between individual responsibility for **Bivens**-claims and federal agency responsibility to fund a successful Bivens claim against an individual serving within that agency. There should be a clearer understanding of the harm suffered by individual victims and the need for agency supervision of those persons identified as dangerous but permitted to serve as federal employees.

A review of the wisdom of the "qualified immunity defense" so often raised by "individual defendants" and discussed in F.D.I.C. v. Meyers, 114 S. Ct. 996 (1994) is urged.

It is clear that those who presently volunteer to serve in uniform are being denied a remedy for Bivens-type intentional violations of their Constitutional rights due to the decision in Feres.

IMPERATIVE PUBLIC IMPORTANCE

This case is of imperative public importance for the following reasons:

The Navy system of justice is so infected with abuse and command influence that it is incapable of protecting the Constitutional, civil, employment and human rights of the individual service member. [Appendix Exhibits C, J, and K plus U. S. News & World Report article of November 9, 1992, pages 46-62].

Unfortunately those leaders evidencing questionable judgment at the highest levels have access to weapons systems and the lethal nuclear arsenal.

This petition urges the Court to review the question of whether there should be temporary judicial oversight of Article I Section 8 courts and the United States Navy administrative employment processes.

Only by such critical temporary judicial oversight of the United States Navy may the citizens of this nation be assured their peace, their prosperity, and the continued existence of our strong navy which are all essential for ensuring our freedom guaranteed by the Constitutional form of government.

The individual and collective freedoms ensured by our sacred Constitution and vitally necessary to assure a continued viable national defense capability are indeed at stake.

ARTICLE 134 OF THE UCMJ IS UNCONSTITUTIONAL

Article 134 of UCMJ denies all uniformed members of the Armed Forces of the United States of America of Fifth Amendment **substantive due process** since it attempts to regulate "disorders and neglects to the prejudice of good order and discipline in the armed forces". It is so vague that it does not give reasonable notice of what a soldier or sailor must do to avoid committing an offense on duty or even in the civilian community as a non-paid, non-dutied reservist.

Article 134 of UCMJ deprived Petitioner of rights guaranteed by the Due Process Clause and the equal protection of the Fifth Amendment.

Article 134 was also applied capriciously and in bad faith. The best example of such whimsical application is illustrated in the failure to prosecute Admiral Frank Kelso Jr. despite allegations

that Admiral Kelso lied to a military courts martial thereby obstructing justice.

The very same Admiral Kelso as acting Secretary of the Navy "deemed" Article 134 to apply to the civilian Petitioner who, at all relevant times, was not being paid nor in any duty status when an incident arose in the civilian community in which all legal and ethical issues were decided in favor of the Petitioner by a civilian court and the Minnesota lawyer's board of professional responsibility.

SECNAVINST 1920.6 AND MCO 1900.16 ARE UNCONSTITUTIONAL

SECNAVINST 1920.6 denies **all reserve** members of the Armed Forces of **substantive due process** by regulating conduct of non-paid IRR reservists in the civilian community which conduct **is without any service connection** and which permits the assertion of military jurisdiction into purely private civilian matters by "**deeming**" reservists to

have "committed" a violation of the UCMJ in the civilian community despite the absence of any conviction or even any sworn witness testimony ever presented against the reservist.

SECNAVINST 1920.6 and the use of a board of officers deprived Petitioner of the fair and impartial procedure guaranteed by the Due Process Clause and the equal protection of the Fifth Amendment. As a reservist Don Fuller was required to pay more than $3,000.00 to attend a distant employment hearing. Such hearing was before a panel of three officers without legal training whereas DOD civilian employment hearings are determined by administrative law judges.

THE COURTS OF APPEAL ARE IN CONFLICT

The courts of appeal of the United States Court are in conflict on the issue of whether a uniformed member of the Armed Services must exhaust all administrative

remedies before a United States District Court has jurisdiction to hear issues concerning loss of uniformed status and reduction in pay and rank and involuntary separation from the Armed Forces.

In summary form, the appeals courts are split on the requirements and necessity of exhaustion of administrative remedies as follows:

> Second Circuit. There is no federal court jurisdiction until administrative remedies are exhausted. Michealson v. Herren, 242 F. 2d 693 (CA2 1967).
>
> Third Circuit and the District of Columbia. The federal courts have jurisdiction even before all administrative remedies are exhausted and that the trial court should retain jurisdiction but stay consideration until administrative remedies are exhausted.
>
> An exception obtains where there are "special circumstances" dictating immediate judicial review. Nelson v. Miller, 373 F. 2d 474 (CA3 1967) Sohm v. Fowler 365 F. 2d 915 (CA D.C 1966).
>
> Fourth Circuit. In Reed v. Frank, 297 F. 2d 17 (CA4 1961). Trial courts have jurisdiction where the plaintiff has a

substantial claim that military regulations or procedures violate constitutional rights.

Fifth Circuit. The courts lack jurisdiction over military discharge complaints until all available administrative remedies are exhausted. Stanford v. United States, 413 F. 2d 1048 (CA5 1969).

Eighth Circuit. in Horn v. Schlesinger, 514 F. 2d 549 (CA8 1975) There must be exhaustion of administrative remedies except where "grave constitutional rights seem imperiled and the court entertains a presumption that the public officials acted properly and in accordance with the rules regarding their public office".

Ninth Circuit. Yet another approach is taken by the Ninth Circuit in Schwartz v. Covington, 341 F. 2d 537 (CA9 1965) where the Court stayed a discharge proceeding pending review by the BCMR.

Tenth Circuit. The Court has held that a plaintiff must exhaust administrative remedies even when there are Constitutional matters to be reviewed but in Bard vs. Seamans 507 F. 2d 765 (CA10 1974) court held that resort to the BCMR is not demanded where to do so "would be futile".

THE NAVY LAWYER'S PURPOSEFULLY MISREPRESENTED PETITIONER'S RECORD IN THE FEDERAL DISTRICT COURT

The proceedings in the District Court were stayed for about a year while the testing, rebuttal, and appeal process occurred in the Navy medical arena. On December 15, 1992, after the Petitioner had again paid his own way to a hearing in Bethesda, Maryland, Fuller was confirmed physically and mentally fit for duty with the United States Marine Corps Reserves.

Neuropsychological testing required for Petitioner by the Navy Department and administered in the Twin Cities, resulted in Petitioner scoring 99 percentile or 15/15 words remembered on the memory testing. Petitioner had a normal EEG and he obtained a normal MMPI.

The only matter of concern was that it was reported by a Navy doctor that Petitioner appeared delusional about the DIS agents who were messing with **his clients**. Don Fuller had only reported what his clients were experiencing. Don Fuller made it very clear

that he was not afraid of the DIS agents and Fuller accepted certain risks in representing his clients but did not anticipate the level of sustained official retaliation. [Appendix Exhibit C, D and E]. At all times, Petitioner remained certain that **"OPERATION FERRETT"** would work.

Despite the Navy doctor's findings, the civilian testing medical team saw nothing of concern or which would interfere with the Petitioner's military or civilian work.

The Navy psychiatrist for reasons known only to him, ignored all of the military and civilian employment opinions including the opinion of the Honorable David S. Doty, United States District Court Judge [Appendix Exhibit C, D, and E] regarding Fuller; strangely, the Navy doctor stated that Don Fuller was not any longer fit for duty as a United States Marine reservist. (Note - the previous year the same Navy psychiatrist had

found Fuller fit for duty to attend the administrative discharge hearing.

The only changed circumstances, between reports, were that Don Fuller had obtained absolutely "normal" findings with exceptional memory results on the intervening standardized testing and substantiated and reported the illegal arms and equipment sales by federal employees.

Unfortunately, Great Lakes Naval Hospital personnel chose to FAX the Navy doctor's opinion into the Petitioner's civilian law office at a time when Great Lakes personnel had first called and determined that Don Fuller was not there.

Petitioner then rebutted the Navy psychiatrist's opinion by demonstrating that what Don Fuller was reporting were the statements of his "civilian clients" as verified by photographs and affidavits of DIS harassment and criminal misconduct.

What was being reported were not the personal observations or thoughts of Don Fuller. Petitioner was normal except for the extreme concerns for his clients about the DIS misconduct and what appeared to be acts of treason by federal employees.

Petitioner exercised his rights under the Navy medical regulations and rebutted the finding of the Navy doctor.

On December 15, 1992, the Physical Evaluation Board in Bethesda, Maryland found that the Petitioner was totally fit for duty and that the finding of the Navy doctor was invalid.

The rebuttal documents contained in Fuller's military personnel files were intentionally omitted by the government attorneys in their motions and memorandum filed in District Court.

Despite having been advised by Marine Corps attorneys that intentional fabrication of Fuller's personnel records would be

illegal, the Navy lawyer chose to submit into the civilian community and to the District Court the invalid, overturned and temporary Navy doctor's findings, which included the Navy doctor's determination that Don Fuller was not fit to practice law in the civilian community.

Don Fuller countered with discovery including Requests for Admissions thereby seeking official confirmation of the extent of the Navy lawyer's misrepresentation to the District Court. [Appendix Exhibit K]. The AUSA and the Navy lawyer then obtained an order denying any discovery.

The District Court trial judge saw nothing wrong with the actions of the Navy lawyer and the AUSA and dismissed Fuller's Complaint since the Petitioner had by then been involuntarily retired from the Marine Corps Reserves. [Appendix Exhibit B].

The District Court trial judge contemporaneously ruled that Fuller's plenary

Petition for expungement of the record falsified by DIS agents could not be considered because Fuller had not exhausted all administrative remedies. [Appendix Exhibit B].

CONCLUSION

Since Petitioner first determined 72 months ago that Americans serving DOD and their country were suffering systemic and repeated abuse and since Petitioner planned and then implemented **"OPERATION FERRETT"** designed to root out and expose unparalleled levels of employment harassment it has been envisioned that the wisdom of the commitment to reasoned law would prevail.

Don Fuller always believed that the respective "offices" of the Commander in Chief and the Solicitor General would, to some extent, someday be allies with and not foes of the Petitioner's claims.

The drafters of the Constitution provided for three branches of government

with separate powers trusting that men and women within those branches would eternally and faithfully fulfill the sacred responsibilities of their respective offices and be diligent in acting so that no single branch ever became too strong or too weak to ensure the necessary balance in our democratic form of federal government.

The essential premise of the Constitution as affirmed in **Marbury v. Madison** is that America is a nation governed by reasoned law and not by men or women.

Of great national concern is that those Naval admirals who have demonstrated through their actions that:

1. they lack integrity and moral courage:

2 they will not respect the individual, civil, human and Constitutional rights of the men and women entrusted to them; and

3. they will obstruct justice

are "some" of the same admirals entrusted with the safekeeping of tactical and strategic nuclear weapons and delivery systems.

Petitioner urges the Court to review its holdings in **Dinsman v Wilkes, Feres, Bivens, Stanley**, and **Chappell** in light of the current appreciation of the particular circumstances required, by a nation deeply rooted and committed to the furtherance of and protection for basic human rights, to raise and maintain an all-volunteer military force in the nuclear and space age.

It is the holding in **Feres**, not any act of Congress or the President, which currently bars the most gifted nuclear engineer or the most common patriot serving in uniform of a recovery, based solely on status, for serious and intentional deprivations of their Constitutional rights or injuries sustained incident to their service.

It is time to trust and protect the sailors and Marines honorably serving in uniform and to root out and hold accountable those who fail to uphold the special trust and confidence and oaths of their official positions.

Petitioner also urges the Court to resolve the conflicts between the circuits concerning "exhaustion of administrative remedies" when grave Constitutional rights are involved and men with "no discretion or integrity" make official decisions.

THE REMEDIES

By deciding that Article 134 of the UCMJ is unconstitutional the primary instrument for disparate treatment of military personnel would be removed.

By deciding that SECNAVINST 1920.6 and MCO 1900.16 are unconstitutional, the process which requires military reservists to pay their way to distant due process hearings would be stopped. The fundamentally unfair

uniformed personnel hearing process before a panel of three officers would be halted.

By overruling **Feres**, highly trained and well educated voluntary military personnel would no longer end up as second class citizens who are denied financial recovery for tortuous damages simply because of their status.

By fashioning some form of temporary oversight of the Navy Department the Navy may someday again be a governmental agency in which men and women of honor and integrity uniformly serve and by their selfless service inspire renewed national commitment to acceptance of individual responsibility.

For the protection of those in uniform and for the future defense needs of America, it is essential that the integrity of the United States Navy be restored.

Without temporary judicial oversight the immediate horror stories will continue to daily effect too many uniformed personnel and

their loved ones and undermine national defense security interests and capability.

POSTSCRIPT

There is no legitimate or justifiable governmental reason permitting insidious "official" discrimination by individuals with known propensity for harming others with **Bivens**-type treatment.

Perhaps the process of judicial review will also engender Congressional inquiry into:

(1) the lending practices by which FDIC and FSLIC insured institutions routinely deny loans to veterans because of their "transient status";

(2) the disparity of treatment between high school graduates who receive government guaranteed "loans" and become college students versus those who elect to serve their

country in uniform and struggle to survive;

(3) the reasons why uniformed personnel receive a "second class medical plan" instead of treatment by skilled, insured civilian surgeons and physicians during peacetime and certainly when their blood is shed during times of war;

(4) the irreversible economic damage done to veterans when they move throughout the world on a moments notice leaving homes and families behind.

Only when veterans are fully recognized as humans in uniforms rather than expendables will they obtain the rights and status of full American citizenship in both their military and civilian occupations and communities.

Acts of war will always be inhumane; however, there is no justifiable reason for

civilian and military leaders to breach the special trust and confidence of their position or inhumanely treat those who elect to serve in uniform.

The next time America's sons or daughters lose their limbs or lives in war, it would of some comfort to know that America's best doctors were nearby and equally shouldering the ultimate burden of American citizenship when they suffered.

Only then may the Commander-in-Chief, each member of congress and each general and each admiral rightfully join in saying, "we did our duty".

Respectfully submitted,

Don B. Fuller, Pro Se
570 Minnesota Law Center 514 Nicollet Mall
Minneapolis, MN 55402
612-332-0938

Dated: October 10, 1994 Appendix
Exhibits A-L are separately bound.

From exhibit attached to Appendix F. A 24 hour stakeout vehicle in front of civilian home in civilian community. Upon checking with DMV it was determined that license plate "KC40GR" was not a plate issued by the state.

94 707 OCT 18 1994

No. OFFICE OF THE CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1994

Don Fuller, pro se

Petitioner,

vs.

Secretary of Defense, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITIONER'S APPENDIX

Don Fuller, Pro Se
570 Minnesota Law Center
514 Nicollet Mall
Minneapolis, MN 55402
512-332-0938

RECEIVED
OCT 19 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPENDIX A

The Eighth Circuit Court Opinion fails to note that the original "anonymous phone tip" to DIS was from a Eden Prairie assistant city attorney after Don Fuller had caught and confronted her lying on the record to a judge.

The Eighth Circuit Court Opinion fails to note that the allegations in the civilian community were initiated by a person who had been hospitalized as the result of with alcohol abuse and suffered periodic bouts of depression and hallucination due to a thyroid disorder.

The original Complaint made in civil court by the person admitted that Don Fuller had not been in contact with her but that the assistant Eden Prairie City attorney had told her to file it since Don Fuller was attempting to get the medical records confirming her periods of hospitalization for alcohol abuse.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-2791

Don B. Fuller,

Appellant,

Appeal from the United States District Court for the District of Minnesota.

v.

The Secretary of Defense of the United States; The Secretary of the Navy; The Commandant of the United States Marine Corps; The Director, Marine Corps Reserve Support Center; The Commanding General, Fourth Marine Division, United States Marine Corps,

Appellees.

Submitted: May 10, 1994

Filed: July 18, 1994

Before MAGILL, Circuit Judge, FLOYD R. GIBSON and JOHN R. GIBSON, Senior Circuit Judges.

MAGILL, Circuit Judge.

Don B. Fuller appeals from the district court's[1] order dismissing his complaint, denying his motion for leave to amend the complaint, and denying his motion for Rule 11[2] sanctions. We affirm.[3]

I. BACKGROUND

Fuller filed suit in district court to obtain review of an administrative decision to separate him from the United States Marine Corps Reserves (the Reserves). Fuller entered the Reserves upon retirement from the United States Marine Corps. A practicing attorney, Fuller eventually rose to the rank of colonel.

In 1990, the Defense Investigative Service (DIS) learned that a state court had issued a restraining order preventing Fuller from harassing his former girlfriend who accused him of stalking her. In the course of its investigation, DIS also discovered that Fuller may have engaged in unprofessional behavior during the court proceedings regarding the stalking incident. Eventually, a Board of Inquiry (the Board) convened to

determine whether Fuller should) be separated from the Reserves. Two possible bases for separation were considered: misconduct related to the stalking incident and substandard performance of duty as evidenced by Fuller's demonstration of poor leadership qualities. A hearing was held that was attended by Fuller and his military counsel.

After consideration of both parties' evidence and arguments, the Board found that the evidence supported a finding of misconduct and substandard performance. The Board recommended that Fuller be retired from the Reserves at the inferior grade of lieutenant colonel. In February 1992, the Secretary of the Navy approved the recommendation, noting that Fuller lacked sufficient time as a full colonel to retire in that grade.

In March of 1992, this action was commenced by Fuller against the United States Secretary of the Defense, the Secretary of the Navy, the Commandant of the Marine Corps, the Director of the Marine Corps Reserve Center,

and the Commanding General of the 4th Marine Division of the United States Marine Corps (collectively, the defendants). Fuller, alleging that the Board hearing did not afford him due process, requested the district court to (1) enjoin the enforcement of and set aside the retirement decision, (2) restore him to his former status, (3) expunge from his military records references to the stalking incident and the DIS investigation, (4) order the defendants to provide him with precise standards of leadership, and (5) order a new hearing.

Pending evaluation for physical or mental disability by a Physical Evaluation Board (PEB), the defendants agreed to refrain from separating Fuller from the Reserves. Ultimately, the PEB found that Fuller was physically qualified for service and thus ineligible for a preferable medical retirement. Fuller moved for an injunction preventing his separation from the Reserves. The district court issued a thirty-day stay,

pending its decision on Fuller's motion for injunctive relief. In March 1993, injunctive relief was denied. Fuller retired on April 1, 1993.

After Fuller's retirement, the defendants moved to dismiss the complaint. Fuller, in turn, moved to file an amended complaint and requested the imposition of Rule 11 sanctions against the prosecuting attorney and an attorney from the Judge Advocate General's Corps (JAG). The district court granted the motion to dismiss the complaint and denied Fuller's motions. Fuller timely appealed.

III. DISCUSSION

A. The Motion to Dismiss

The district court granted the defendants' motion to dismiss. The district court based its dismissal on (1) Fuller's failure to bring his retirement and expungement claims before the Board of Correction for Military Records (BCMR) and (2) the defendants' immunity from suit because they were sued in their official

capacity. Fuller conceded that the original complaint was subject to dismissal for the reasons cited by the district court, and hence he did not oppose the motion to dismiss the complaint. Rather, he filed a motion for leave to amend the complaint. Because Fuller did not oppose the motion to dismiss the complaint, we decline to review this claim.[4]

B. The Motion to Amend the Complaint

We review the denial of a motion for leave to amend a complaint for an abuse of discretion. Brown v. Wallace, 957 F.2d 564, 565 (8th Cir. 1992). Because defendants had already filed their answer to the original complaint at the time the motion was filed, Fuller may only amend the complaint by leave of court. See Fed. R. Civ. P. 15(a). "[L]eave shall be freely given when justice so requires." Id. And, leave to amend should be granted absent a good reason for the denial, such as undue delay, bad faith, undue prejudice to the nonmoving party, or futility.

Thompson-El v. Jones, 876 F.2d 66, 67 (8th Cir. 1989).

Fuller filed a ninety-five-page proposed amended complaint (Amended Complaint). Raising eighteen counts, the Amended Complaint dismissed claims against the Commandant of the Marine Corps, the Director of the Marine Corps Reserve Support Center, and the Commanding General of the 4th Marine Division, and sought to add as defendants, Richard Cheney, H. Lawrence Garrett III, Robert J. Turay, Robert Simpson, Lee R. Sampson, Lee Olson, D.L. Haurilick, Robert Small, Alicia Connolly, and the United States of America.

The Amended Complaint brought Bivens actions against five DIS agents. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (authorizing suits for damages against federal officials based upon a deprivation of constitutional rights). It also brought Bivens actions against Richard Cheney, the former Secretary of Defense, for failing to supervise

and train DIS agents, and against H. Lawrence Garrett III, the former Secretary of the Navy, for failing to adequately train and supervise Navy and Marine personnel. Fuller further claimed that Assistant United States Attorney Robert Small and JAG attorney Alicia Connolly violated his constitutional rights by submitting false and misleading documents in this action. Fuller sought monetary relief from all individual defendants. Finally, Fuller reasserted his earlier claim that the Board hearing violated his right to due process of law and sought reinstatement to his former rank of full colonel.

The district court denied Fuller's motion for leave to amend the complaint, finding that Fuller's retirement claim still had not been brought before the BCMR and that the Bivens claims were futile under the Feres doctrine, see Feres v. United States, 340 U.S. 135, 146 (1950) (the United States is immune from tort liability for injuries arising out of and in the course of military service). See generally

Chappell v. Wallace, 462 U.S. 296 (1983). In addition, the district court found that Fuller's attempt to add multiple new defendants and claims substantially changed the focus of the action and was thus confusing and inefficient.

We hold the district court did not abuse its discretion when it denied Fuller's motion for leave to amend the complaint. Fuller's Amended Complaint sought to add ten additional defendants and substantially different claims arising from fundamentally different facts. Fuller sought to expand his claims from those seeking relief from the decision to retire him as a lieutenant colonel to one asserting significant constitutional claims against various government officials. Justice does not require a district court to allow a defendant to alter his complaint in such a manner. See Brown, 957 F.2d at 566; Weigand v. Afton View Apartments, 473 F.2d 545, 549 (8th Cir. 1973); accord Faser v. Sears, Roebuck Co., 674 F.2d 856, 859-60 (11th Cir. 1982).[5]

As to the due process claim, we hold the district court did not abuse its discretion because such an amendment would have been futile. Fuller's claim seeks judicial relief for a discretionary, and hence unreviewable, decision of the Secretary of the Navy. See Wood v. United States, 968 F.2d 738, 739-40 (8th Cir. 1992). Had Fuller brought this claim before the BCMR, such "decisions are subject to judicial review and can be set aside if they are arbitrary and capricious, or not based on substantial evidence." See Chappell, 462 U.S. at 303. The district court properly dismissed the motion for leave to amend this claim because it is a "nonjusticiable claim[] involving the military structure." Wood, 968 F.2d at 739.

We find no merit to Fuller's motion for Rule 11 sanctions against Small and Connolly.

III. CONCLUSION

We affirm the order of the district court dismissing Fuller's complaint, denying him

leave to amend the complaint, and denying RuIe 11 sanctions.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Footnotes:

1. The Honorable Harry H. MacLaughlin, Senior United States District Judge for the District of Minnesota.

2. Federal Rule of Civil Procedure 11.

3. We grant Fuller's motions to supplement the record.

4. We note in addition that the initial claim for relief raised by Fuller in his complaint--the request for an injunction preventing his retirement--is now moot as a result of Fuller's retirement from the reserves on April 1, 1993.

5. We, consequently, need not review the district court's findings regarding Fuller's constitutional claims for damages.

APPENDIX B

The District Court Opinion fails to note that the original "anonymous phone tip" to DIS was from a Eden Prairie assistant city attorney who Don Fuller had caught and confronted concerning lying on the record to a judge.

The District Court opinion fails to identify the "anonymous phone tipster" who reported that Petitioner had "fudged" his medical reports. The "anonymous phone tipster" was an insurance company employee who Don Fuller had reported for trying to deny coverage physical rehabilitation for civilian auto injuries. Don Fuller reported, as is required by law, that the Marine Corps had found him medically fit to again serve. The insurance company employee then denied coverage stating that if you are "fit enough to be a Marine you are not in need of any further accident related medical benefits". Fuller had responded that he could not serve but was found fit to serve. An "anonymous phone tip" resulted. Fuller spent a year and more than $7,500.00 to correct the military records and to again be cleared to serve as a Reserve officer without pay.

The District Court Opinion fails to note that the allegations in the civilian community were initiated by a person who had been hospitalized as the result of with alcohol abuse and suffered periodic bouts of depression and hallucination due to a thyroid disorder.

The original Complaint made in civil court by the person admitted that Don Fuller had not been in contact with her but that the assistant Eden Prairie City attorney had told her to file it since Don Fuller was attempting to get the medical records confirming her periods of hospitalization for alcohol abuse.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Don B. Fuller,

Plaintiff,

CIVIL
4-92-233

MEMORANDUM AND ORDER

The Secretary of Defense of the United States;
The Secretary of the Navy;
The Commandant of the Marine Corps;
The Director, Marine Corps Reserve Center;
and The Commanding General,
Fourth Marine Division, United States Marine Corps, Defendants.

Don B. Fuller, 570 Towle Building, 320 Second Avenue South, Minneapolis, MN 55401, pro se.

Thomas B. Heffelfinger, United States Attorney, Robert M. Small, Assistant U.S. Attorney, 234 U.S. Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, for defendants.

This matter is before the Court on defendants' motion to dismiss. The motion will be granted.

FACTS

This action arises out of plaintiff's separation from the United States Marine Corps Reserve. Plaintiff is a practicing attorney who appears pro se in this action. He was

commissioned as an officer in the United States Marine Corps in 1966; after receiving an honorable discharge in 1973, plaintiff affiliated with the Reserve, eventually rising to the rank of colonel. In February 1988, plaintiff suffered a head injury which rendered him physically unqualified to perform his military duties. In July 1989, plaintiff had a physical examination and was declared fit for duty; however, in October of 1989, the Bureau of Naval Medicine learned that plaintiff had "fudged" on his July 1989 physical, and consequently declared him unfit for duty. A Physical Evaluation Board (PEB) found plaintiff fit for duty once again in October 1990.

In July 1990, the Defense Investigative Service (DIS) learned that in September 1989, plaintiff's former girlfriend had filed a complaint against him with the Eden Prairie Police Department. The complaint alleged that plaintiff had harassed the complainant by telephoning her up to six times a day, writing

her letters stating that he wanted her to be his wife and have his children, sending her pictures and chocolates in the mail, and waiting for her outside her apartment. Plaintiff allegedly continued to harass the complainant after she asked him to stop; eventually, a state court issued a restraining order against plaintiff. In its investigation of the Eden Prairie matter, the DIS learned that plaintiff had referred to his military responsibilities, his top secret clearance, and his military assignments in interviews with police officers. The DIS also learned of allegations that plaintiff's conduct in the court proceedings had been unprofessional. Based on its investigation, the DIS recommended that plaintiff undergo a psychiatric evaluation.

In September 1991, in response to the DIS report, the commanding general of the Fourth Marine Division convened a Board of Inquiry to determine whether plaintiff should be separated from the Marine Corps. The convening

order instructed the board to consider two bases for separation: first, misconduct as evidenced by the commission of a civil offense; and second, substandard performance of duty as evidenced by a failure to demonstrate acceptable qualities of leadership. The Board of Inquiry held a hearing on the matter; plaintiff attended the hearing and was represented by military counsel.

The Marine Corps' evidence at the hearing included the Eden Prairie police complaint, as well as the full police record of the investigation. A key document in the government's case was a letter written by the plaintiff to the complainant in the Eden Prairie matter. The letter was addressed to the complainant and her dog, and was supposedly from the plaintiff's dog. The Eden Prairie police viewed the letter as an attempt by plaintiff to circumvent his instructions not to have contact with the complainant. In a May 1991 letter to the commanding general of

the Fourth Marine Division, plaintiff claimed that the letter was a purposefully coded phonetic letter designed to catch the complainant in her lies, and stated that he wrote the letter as part of a calculated plan to have the entire matter heard by the Marine Corps.

The Marine Corps also presented the Board of Inquiry with numerous letters from the plaintiff to high government and military officials offering opinions on foreign and internal political matters, and complaining of an alleged conspiracy against him by DIS agents. Some of the letters written by plaintiff were abusive. For example, he referred to DIS agents as "scum-sucking retromengents," and to the Eden Prairie prosecutor as a "lethargic buffalo brain." His letters also contained numerous sexual allusions.

On November 6, 1991, after considering both parties' evidence and arguments, the Board of Inquiry concluded that the

preponderance of the evidence supported a finding of substandard performance and misconduct. The board therefore recommended that plaintiff be retired from the Marine Corps Reserve in the next inferior grade of lieutenant colonel. The Secretary of the Navy approved the recommendation on February 24, 1992, noting that plaintiff did not have sufficient time in grade as a colonel to retire in that grade. On March 9, 1992, plaintiff commenced this action, alleging that the Board of Inquiry hearing did not afford him due process. He asked the Court to (1) enjoin the Secretary of the Navy and the Commandant of the Marine Corps from retiring him, (2) set-aside the decision of the Secretary of the Navy to retire him and reduce his rank, (3) restore him to his position as an active member of the Marine Corps Reserve, (4) order defendants to provide him with the standards of leadership required of him, and (5) order defendants to provide him with a new hearing. Plaintiff also filed a petition for

expungement of military records, in which he asked the Court to order defendants to remove from his records all references to the Eden Prairie police report and investigation.

Upon receiving the complaint, defendants agreed to voluntarily refrain from discharging plaintiff, so that they might reevaluate his medical condition. Defendants believed that plaintiff may have been physically or mentally disabled or suffering from a personality disorder; a finding to that effect might have entitled plaintiff to a medical retirement. The parties agreed to stay the proceedings in this action until thirty days after a PEB reevaluated plaintiff's condition and rendered a final decision. In August 1992, the PEB issued preliminary findings stating that the plaintiff was not physically qualified for duty and that he was suffering from a delusional disorder. After additional administrative proceedings, however, the president of the PEB declined to accept the preliminary findings, because there was

insufficient evidence to support a diagnosis of significant pathology. Thus, the final decision of the Navy was that plaintiff was physically qualified for active duty and was therefore ineligible for a medical discharge.

The Navy intended, upon expiration of the stay of proceedings, to execute its previous decision to retire plaintiff in the next inferior rank. Prior to that time, however, plaintiff moved for an injunction to prevent the Navy from doing so. The Court extended the stay for an additional thirty days, in order to allow time to hear plaintiff's request for injunctive relief. On March 23, 1993, the Court denied plaintiff's motion for injunctive relief, and on April 1, 1993, the Secretary of the Navy separated plaintiff from the reserve. Defendants now move to dismiss the complaint.

DISCUSSION

In reviewing a motion to dismiss for failure to state a claim the Court presumes all factual allegations to be true and all reasonable inferences from those allegations

are construed in favor of the non-moving party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Palmer v. Tracor. Inc., 856 F. 2d 1131, 1132 (8th Cir. 1988). The appropriate inquiry is not whether plaintiff will ultimately prevail but whether he will be allowed to introduce evidence to support his claims. Scheuer, 416 U.S. at 236. Because dismissal on the pleadings is an extreme remedy it is not favored by the courts and is employed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). Robinson v. MFA Mutual Insurance Co., 629 F. 2d 497, 500 (8th Cir. 1980). See also Palmer, 856 F. 2d at 1132. In arguing for dismissal, defendants correctly note that federal courts may review discrete military personnel decisions only where a plaintiff challenges the facial constitutionality of a military statute or regulation or seeks review of a final agency

action. Wood v. United States, 968 F. 2d 738, 739-40 (8th Cir. 1992) (citing Watson v. Arkansas National Guard, 886 F. 2d 1004 (8th Cir. 1989)). In this case, plaintiff seeks review of defendants' administrative decision to retire him in the next inferior rank. However, plaintiff has failed to exhaust his administrative remedies by seeking review of defendants' decision from the Board for Correction of Naval Records (BCNR). The BCNR has authority to correct military records to remove errors or injustices. 10 U.S.C. ¶ 1552; see also Chappell v. Wallace, 462 U.S. 296, 303 (1983). The BCNR has authority to order retroactive back pay and promotion. 10 U.S.C. ¶ 1552(c). It also has authority to recommend reinstatement. Declaration of W. Dean Pfeiffer. As the Court noted in its order denying plaintiff's motion for preliminary injunction, exhaustion of administrative remedies, including an appeal to the BCNR, is a prerequisite to judicial review. Watson, 886 F. 2d at 1008. Because it appears that

plaintiff has failed to exhaust his administrative remedies regarding defendants' decision to discharge him in the next inferior rank, the Court will dismiss plaintiff's complaint insofar as he challenges that decision.

The same reasoning applies to plaintiff's request for expungement of military records. The BCNR is explicitly authorized to correct military records. Plaintiff has not, however, requested the BCNR to remove from his records references to the Eden Prairie police report and investigation. Therefore, plaintiff's petition for expungement of records will be dismissed for failure to exhaust administrative remedies.

Defendants note that in addition to challenging his discharge and requesting expungement of certain materials from his records, plaintiff has in his complaint and in affidavits submitted to this Court made repeated references to an alleged conspiracy between DIS agents and the Eden Prairie

prosecutor. Plaintiff claims that this conspiracy violated his constitutional rights. Defendants assert that to the extent that these allegations sound in tort, they are inadequate to state a claim because plaintiff has not filed an administrative claim for damages; such an administrative claim is a prerequisite to suit under the Federal Tort Claims Act. 28 U.S.C. ¶ 2675.

Defendants further argue that to the extent plaintiff asserts a direct constitutional action under Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), his claim must fail because he has not sued any defendants in their individual capacities. Defendants point out that Bivens actions are available only against individual federal officials; the United States and its agencies are not proper defendants to a Bivens suit, because they enjoy sovereign immunity from such actions. Laswell v. Brown, 683 F. 2d 261, 267-68 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983). Because plaintiff named only the

United States, United States agencies, and United States officials in their official capacity, defendant asserts that plaintiff has failed to state a claim under Bivens. In response to defendants' motion to dismiss, plaintiff concedes that his original complaint is subject to dismissal for failure to exhaust administrative remedies and failure to state a claim. However, he argues that rather than dismissing the action in its entirety, the Court should allow him to file an amended complaint. In his 95-page proposed amended complaint, plaintiff raises eighteen counts, which fall into four categories. First, plaintiff raises Bivens actions against five individual DIS agents, who allegedly interfered with plaintiff's Fourth, Fifth, and Sixth Amendment rights and his constitutional right of privacy in their investigation. Second, plaintiff raises Bivens claims against Richard Cheney, the former Secretary of Defense, and H. Lawrence Garrett, III, the former Secretary of the Navy; he alleges that

Cheney failed to adequately supervise and train DIS agents, that Garrett failed to adequately supervise and train Navy and Marine Corps personnel, and that those failures deprived plaintiff of his Fourth, Fifth, and Sixth Amendment rights and his constitutional right of privacy. Third, plaintiff claims that Assistant U.S. Attorney Robert Small and JAG Corps Attorney Alicia Connolly deprived him of his Fourth, Fifth, and Sixth Amendment rights and his constitutional right of privacy by submitting false and misleading documents in this action. Plaintiff seeks monetary damages against all of the individual defendants for his constitutional claims. Finally, plaintiff alleges that the Board of Inquiry hearing did not conform to the requirements of administrative and constitutional due process; he seeks a declaration that his retirement is invalid and an order vacating the retirement and restoring him to the rank of colonel.

Federal Rule of Civil Procedure 15(a) provides that a party may amend a pleading

once as a matter of course at any time before a responsive pleading is served; because defendants have answered plaintiff's complaint, he may amend his pleadings only by leave of court. Rule 15(a) provides that "leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Absent a good reason for denial -- such as undue delay, bad faith, undue prejudice to the non-moving party, or futility of amendment -- leave to amend should be granted. Thompson-El v. Jones, 876 F. 2d 66, 67 (8th Cir. 1989) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

The Court concludes that leave to amend should be denied, for several reasons. First, as the discussion above indicates, plaintiff's claim seeking judicial review of defendants' decision to retire him in the next inferior grade is barred by his failure to exhaust administrative remedies. Because amending the complaint to reassert that claim would be futile, there is no reason to allow the amendment. Second, it appears likely that an

amendment raising Bivens claims would also be futile. Under the doctrine established in Feres v. United States, 340 U.S. 135, 146 (1950), Bivens claims are nonjusticiable if they involve injuries which arose out of or were in the course of activity incident to military service. Wood v. United States, 968 F. 2d 738, 739 (8th Cir. 1992) (citing Watson v. Arkansas National Guard, 886 F. 2d 1004, 1005-08 (8th Cir. 1989)). In his amended complaint, plaintiff seeks to bring Bivens claims against various individuals who allegedly engaged in misconduct while conducting an investigation in order to determine whether plaintiff was fit to serve in the military. Actions taken in the context of such an investigation would likely be incident to military service, and therefore would not be subject to judicial review under the Feres doctrine.

Finally, plaintiff's amended complaint adds numerous new defendants, some of whom, such as Small and Connolly, had no connection

with the claims set forth in the original complaint. Plaintiff's amended complaint also substantially changes the focus of this action, which was originally a request for judicial review of an administrative decision under the Administrative Procedure Act. Where, as here, it would be inefficient and possibly confusing to add defendants and claims that are far removed from those appearing in the original complaint, leave to amend may be denied. Brown v. Wallace, 957 F. 2d 564,566 (8th Cir. 1992). Therefore, the Court will deny plaintiff's motion to amend the complaint.

In addition to requesting leave to amend his complaint, plaintiff has once again moved for imposition of sanctions under Federal Rule of Civil Procedure 11. Plaintiff moved for Rule 11 sanctions against Small and Connolly when he brought his motion for injunctive relief, alleging that Small and Connolly had submitted false and misleading documents to the Court. The Court denied plaintiff's motion

for Rule 11 sanctions, finding insufficient evidence of false and misleading submissions to warrant imposing sanctions. It appears that plaintiff bases his current Rule 11 motion on the same grounds as his previous motion; he alleges that Small and Connolly have either not provided the Court with the full administrative record, or have somehow falsified the record.

Because plaintiff has not clarified how the documents submitted by Small and Connolly are false and misleading, and because he has submitted nothing to suggest that the Court should revisit its prior ruling on his motion for sanctions, the Court will again deny plaintiff's motion for Rule 11 sanctions.

Accordingly, based on the foregoing, and upon all the files. records and proceedings herein.

IT IS ORDERED that:

1. defendant's motion to dismiss the complaint is granted;

2. plaintiff's motion for leave to amend the complaint is denied; and

3. plaintiff's motion for the imposition of Rule 11 sanctions is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Judge Harry H.
MacLaughlin
United States
District Court

DATED: June 8, 1993

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

DON B. FULLER

Plaintiff and Petitioner

Civil Action File
No. 4-92 Civil 233

vs.

AFFIDAVIT OF DON B. FULLER

THE SECRETARY OF DEFENSE, et al

Defendants and Respondents

AFFIDAVIT OF DON B. FULLER

STATE OF MINNESOTA

COUNTY OF HENNEPIN

NOW COMES DON B. FULLER, and for his Affidavit in this matter states as follows:

SUCCESSFUL MARINE CORPS CAREER

1. I have been a United States Marine since January 18, 1966.
2. I have attained the grade of Colonel in the United States Marine Corps Reserve.
3. I have performed my military duties consistently in an outstanding manner.

TAB A AND B

4. I am a graduate of Eastern Illinois University, The University of Illinois College of Law, The Marine Corps Basic School, the Amphibious Warfare School, the Marine Corps Institute Command and Staff College Course, the Naval War College Strategy and Policy Course, the National defense University, and the Army War College 2 year non resident course. TAB C

5. In September, 1974, I was the attorney for the Marine Corps program designed to implement the Presidential Clemency Program and upon completion of that duty I was awarded the Meritorious Service Medal. TAB D

6. From October, 1983 until December 1984, I designed numerous quality of life programs for the Family Service Program of the United States Marine Corps. TAB E and F to Exhibit 1.

7. In January, 1985, my Marine Corps legal assistance offices received the

prestigious American Bar Association award, when judged against all other services offices in the entire Department of Defense, for outstanding delivery of legal services. This was the first time ever that a Marine Corps office had been so honored. TAB G

RECENT SUCCESSES AS AN ATTORNEY

8. In March, 1988, I was honored as the alum of the month by the University of Illinois college of law. TAB H

9. During January, 1990, it was necessary for me to take the Minnesota bar examination and I demonstrated complete recovery from the effects of an auto accident.

> "Mr. Fuller demonstrated that he was exceptionally well prepared for every aspect of the bar examination. He developed superb memory skills, prepared detailed outlines and notes, and formulated the most focused and well planned approach to studying for the bar examination that I have seen in my seventeen years of helping students prepare for this exam." Shelly Singer, Executive Director, Minnesota Bar Review. Tab I

10. I have continued in the representation of my clients in an exemplary manner. Tab J and K

11. I have developed a creative mind which is capable of strategic thought and also providing innovative quality of life programs which assist the large numbers of Marines and their families through preventive law programs. Tab P, L, W, X, and Y

SUCCESSES AGAINST DIS

12. Local misguided DIS agents threatened to cause people to lose their security clearances and their jobs if they did anything to thwart the actions of DIS agents who had stated that they were going to again close Honeywell down and cost them another 30 million dollars. Tab M

12. I have demonstrated perseverance, intellectual ability to develop strategy, fortitude and boldness in thwarting a wayward DIS investigation designed to

close Honeywell down and designed to cause Honeywell to lose another 30 million dollars and to cause personal and professional harm to those who tried to stop the wayward DIS agents. Tab J

13. DIS did not get any of the promised 40 to 70 federal grand jury indictments and the entire grand jury process was stopped. Tab N and O to Exhibit 11.

SUBSTANTIAL INVESTMENT IN AND TO THE USMC

14. At every critical moment and when called I have responded to Marine Corps requests to provide valuable services to the Corps. Tab A and B

15. I put two years of concentrated study into the demanding Army War College non-resident program and attended all resident sessions which effort resulted in the following assessment.

"Well qualified for responsible positions on high level staff, but obviously could be used to his fullest capacity in commands at increasing levels of responsibility. The ability to delegate authority, accept responsibility, encourage and

support subordinates, and a powerful understanding of the force-planning process makes him an ideal candidate for service on the Joint Staff...or to the staff of the Space Command." Army War College Fitness Report dtd 27 August 1986. Tab P

16. I have an inventive and creative mind which has resulted in the development of a unique project that has been well received by the Corps.

Developed and produced the "Uncommon Valor was a Common Virtue" Video Tape at a cost of $500.00. Lt. Col. Don B. Fuller - 1 Nov 1990. Tab P and In Camera Tab AH video tape

POTENTIAL FOR FUTURE SERVICE

17. I have critically examined the major issues facing this country during the next 30 years and taken steps to recommend how the Corps can assure a continued lifeblood of quality recruits and I am recognized as having outstanding potential for continued service to the Corps.

Colonel Fuller recognized the positive impact of "Heroes" on the youth of this country and the need for positive role models and the role of the United States Marine Corps. TAB L and Q

"This letter is to strongly recommend the retention for continued duty of Lt. Col. Donald B. Fuller....From my review of his service during that time, knowledge of his determination, awareness of his physical stamina, and personal awareness of his memory and intellectual capabilities, I am of the opinion that Colonel (S) Fuller is unquestionably fit for continued duty and offers superb potential for future outstanding service to the Marine Corps." MGEN Martin L. Brandnter, USMC now serving as a Lt. General and the Director of Operations for the Joint Staff. Tab R

"Lt. Col. Fuller is the epitome of a Marine Corps officer." BGEN W. H. J. Tiernan. TAB S

"He exemplified unsurpassed loyalty and dedication to the Marine Corps. ...would recommend him for future assignments requiring the highest degree of responsibility, professional integrity and moral character." Col. Jerry D. Reece, USMCR. TAB T

"I have seldom seen such a deep and sincere motivation to be a career officer. ...He has a keen interest in and has a broad knowledge of military history, tactics and world affairs. He is bright, dynamic, and innovative. In sum, he is a model field grade Marine Corps officer. I am blessed to have such an officer on my staff. MGEN Robert E. Haebel, USMC (Ret). TAB E

"In my view, Lt. Col. Fuller is the most dedicated Marine Corps officer I have ever met - dedicated to the ideals of the Corps as well as reaching out to help his fellow Marines. ...An officer of his unique capabilities and dedication is one we can ill afford to lose." BGEN D. M. Brahms, USMC, TAB F

"Lt. Col. Fuller is an outstanding communicator, demonstrating a unique ability to provide depth, knowledge, and expertise to a wide variety of subjects both from the podium and in written form. ...Resourceful, imaginative, selfless, and unquestionably loyal are characteristics which describe this officer." Col. C. H. Furbee III, USMCR. TAB A

UNITED STATES MARINE CORPS ACTIONS THAT HARM ME

USMC failure to follow regulations, failure to provide information, threats of destruction of career, and improper information before the formal board of inquiry which have had the combined effect of denying me due process.

18. During October, 1988, I was told by two DIS agents that they were again going to close Honeywell down and cost Honeywell another 30 million dollars. TAB M

19. Since that moment in time, my life has never been the same as DIS has interfered with my privacy, my employment, my law practice and my clients, and with my military career. Tab AI and AJ

20. On July 20, 1990, DIS received an anonymous telephone tip, it has since been determined that it was the prosecuting attorney who had lied to a judge, that there was a problem in the civilian community regarding me. DIS did not know that I had carefully created the trap to lead them astray, to stop the damage they were doing to my client, and to make a public record of their wayward actions.

21. Between July 20, 1990, and July 31, 1990, DIS conducted an unauthorized investigation of me. Between July 20, 1990 and until July 19, 1991 when I fully exposed their actions to DIS headquarters, local DIS agents demonstrated diminished restraint in

their wayward actions when they thought they had something on me which, unknown to them, I had purposefully planted and set a trap.

22. On or about July 31, 1990, DIS forwarded that confidential and unauthorized first document to DIS, Washington, D.C.

23. During August, 1990, I learned that the first unauthorized report had been unlawfully and improperly disseminated within the Marine Corps to cause harm to me.

24. During September, I notified the United States Marine Corps officially that I was having problems with DIS. Tab AC

25. USMC lost that report due to administrative error and it was not included - "due to administrative error" - in the comments of the reviewing officer who decided to initiate a formal board of inquiry on me.

26. During November, 1990, the illegal report was again unlawfully disseminated to my

military records keepers to cause further harm to me.

27. During March, 1991, I was informed that there would be a formal board of inquiry conducted on me concerning the matters set forth in the illegal investigation report which gathered information in violation of my civil rights and rights against unlawful searches and seizures.

28. During April, 1991, through February 28, 1992, I continually sought but was never provided a copy of the leadership standards to which I was expected to conform. To date, those leadership standards, if they even exist, have not been tendered to me.

29. During June, 1991, I was told that DIS was going to make sure that I retired from the Marine Corps and that they were going to use a three pronged approach to separate me from the Corps with one method being the administrative hearing routine. When it was in the Corps

interest, they found ways to delay the board hearing process.

30. On September 17, 1991, I had a hearing of sorts in which I had to prove that I had lived up to the nonexistent standards of conduct expected of a Marine Corps Lieutenant Colonel while I was temporarily not physically qualified for Marine Corps duty and in the civilian community fighting off the wayward actions of DIS agents who had threatened to close Honeywell down again and cost Honeywell another 30 million dollars and who had threatened to cause irreparable harm to careers and security clearances of anyone who got in their way.

31. The senior member of the board threw his pen across the table while I was providing testimony thereby impeaching my credibility and wrongfully influencing the junior members of the board. TAB AI.

32. On September 17, 1991, a copy of the illegal and fictionalized DIS report was

made available to a member of the board of inquiry and during the day it was in plain sight in the area around the hearing room in a federal building in New Orleans, Louisiana. TAB AG

33. On September 24, 1991, to help with my appeal, I requested a copy of the illegally obtained, highly fictionalized, and unlawfully disseminated DIS report that was wrongfully in the hands of one board member and in plain view of a passage way by the formal board hearing room. TAB AF

34. On December 5, 1991, I am now told that the board findings were approved. I was not notified of the action or the process.

35. Sometime between December 5, 1991, and March 2, 1992, the board findings were reviewed and then sent to the secretary of the Navy. I was not notified of the actions or the process.

36. By January 29, 1992, I still had not received the requested illegal, highly fictionalized, and unlawfully disseminated DIS report that had been at the hearing that was not made a part of the formal record.

37. On January 31, 1992, it was necessary to contact Senator Sam Nunn, Chairman of the Senate Armed Services Committee for assistance to find out what was going on as I had received no information whatsoever. TAB AI

38. On February 20, 1992, DIS sent a letter which stated - by deduction after viewing only the 1984 material which was sent - that the August 1, 1991, illegally obtained, highly fictionalized, and wrongfully disseminated DIS report did not exist. TAB AF

39. On February 27, 1992, Senator Nunn informed me that he had contacted the Marine Corps on my behalf to get a report. TAB AK

40. On March 3, 1992, I learned that the Secretary of the Navy has executed a document which will have the effect, if not restrained and enjoined, of reducing me in grade and transferring him to the retired list. If I do not go along with the reduction, I will be discharged and lose all of my retirement benefits accrued over twenty years of honorable service and at great sacrifice to me and to my family. TAB AM

41. Prior to March 16, 1992, despite the failure to abide by DOD regulations and despite the lack of due process in conducting the formal board process, I must elect to be reduced in grade and have a retirement or to be discharged without any retirement after 20 years of honorable service. TAB AM

MY INVESTIGATION OF WAYWARD FEDERAL DIS AGENTS

42. In October, 1988, at the request of a Honeywell employee, I assisted in the investigation of why DIS Agents

"(SAMPSON") and ("BENNETT") had initiated a background investigation on Barb Henry.

43. In October, 1988, ("SAMPSON") and ("BENNETT") told me that they were going to again close Honeywell down for another 30 days and cost Honeywell another 30 million dollars.

44. My life has never been the same since hearing ("SAMPSON") and ("BENNETT") make those boasts.

45. In October, 1988, I began a requested investigation to determine and prove the innocence of another Honeywell employee who had been wrongfully investigated and consistent with the threats of ("SAMPSON") and ("BENNETT"). TAB J.

46. Reputable former DIS agents familiar with Turay and his tactics informed me that the investigation of my client had been a "witchhunt" and a "shark feeding frenzy" and that they would create substantial trouble for anyone who got in the way of their stated objective of closing

Honeywell down and costing them 30 million dollars in additional losses. TAB M and O.

47. My residence and friends became the subject of some unusual and unexplained activities which were consistent with the DIS threats and objectives.

48. Fearing for my own and my client's safety, I set a trap to catch the DIS agents, to expose their actions, and to protect others from continued and irreparable personal and professional harm. TAB O.

49. DIS agents began to interfere with my investigation at a time when I had no clearances and DIS could not lawfully investigate me, they began contacting my employers, contacting my friends and my clients, and others in an effort to exert leverage to get me to quit my investigation and to thwart the defense of my client. TAB AF.

50. DIS agents began boasting that they were going to get 40 to 70 federal indictments and hurt Honeywell. TAB M and N.

51. DIS agents, upon finding out that I had that boastful information, communicated a threat to former DIS agent Greg Bourne to try to cause him not to cooperate with me in the development of a defense to the DIS wrongful claims that could lead to indictments of innocent people. TAB M and N.

52. In July, 1991, the federal grand jury action was terminated and my client and Honeywell were notified that there would be no indictments despite the DIS promises of 40 to 70 federal indictments. TAB O.

53. I then became the target of a vicious and unauthorized and illegal DIS investigation that has crept into the process which has resulted in my being recommended for reduction to Lt. Colonel

and retired from the United States Marine Corps Reserve. TAB AG, AI, and AJ.

DEFENDANTS HAVE FAILED TO AFFORD ME CONSTITUTIONAL AND ADMINISTRATIVE DUE PROCESS WHICH WILL CAUSE ME IRREPARABLE HARM

54. The Secretary of the Navy and the Commandant of the Marine Corps have not provided me with the standards of conduct expected of a United States Marine Reserve officer serving in a non-pay billet and while not on active duty and in the performance of somewhat difficult duty in the protection of his client and others in the civilian community.

55. The Secretary of the Navy and the Commandant of the Marine Corps have held me to a nonexistent standard of leadership and required me to prove that I had met that nonexistent standard.

56. The USMC Board was not held in accordance with procedural due process.

57. Improper records and documents were considered by the board.

58. I have a "property interest" in my career and I am facing the loss of a promotion and demotion to the next inferior grade.

59. If I don't accept the reduction, despite my record of achievement, I will lose my retirement and be discharged from the United States Marine Corps Reserve.

60. I will lose 20 years of service, a pension, and my character and reputation will be destroyed as promised by the DIS agents who were intent on closing Honeywell down and costing Honeywell another 30 million dollars in losses.

61. The wayward actions of the DIS agents who illegally obtained information, who fictionalized the reports, and who illegally disseminated that information to pollute a board finding, have so interfered with the normal board functioning that I have not been provided with any semblance of due process.

USMC FAILED TO PROVIDE STANDARDS OF CONDUCT

62. The Marine Corps does not have written standards of leadership by which to judge my actions.

63. I was obliged to demonstrate that I had lived up to the nonexistent standards of leadership in order to continue to have any Marine Corps Reserve career.

64. The Marine Corps cannot use non-arrest, non-conviction, expunged material, in which all issues were decided my favor and in which DIS agents had their biased work product all over the place, to retire and discharge me with more than 20 years of otherwise honorable service.

65. The Marine Corps cannot use my civilian community actions, allegedly committed during a time when I was not physically qualified for any duty and based on my reaction to a false police report and the subsequent trap to catch DIS, to retire and discharge me with more than 20 years of otherwise honorable service.

66. The Marine Corps cannot use my successful, and necessary trap to stop wayward DIS agent's actions which were harming me, my friends, and my clients to retire and discharge me after I have more than 20 years of otherwise honorable service.

USMC FAILED TO HOLD PROPER BOARD OF INQUIRY

67. The unauthorized and illegal release of confidential and fictionalized reports into the board of inquiry hearing area has painted me in a very false light. TAB AG.

68. The senior member's actions in throwing a pen undermined my creditability and demonstrated bias and a predisposition to rule against me.

69. The failure to provide me with requested information made it impossible to prepare for the hearing and for any appeal.

70. The admitted USMC administrative error in losing exculpatory information which explained the DIS fictionalized reports

and misguided investigations painted me in a false light from the get/go.

71. The admitted DIS administrative error of not providing me with requested and exculpatory information frustrated any chance of countering the damage that DIS had done at the formal board of inquiry hearing room where the unauthorized, fictionalized, documents was wrongfully disseminated.

USMC CONSIDERATION OF IMPROPER INFORMATION

72. The Secretary of the Navy, the Commandant of the Marine Corps, the Convening Authority for the formal board of inquiry, and the board members have viewed false documents and fictionalized reports of the my conduct which have painted me in a false light and cause me to have to overcome bias and prejudging.

73. The Senior member of the board prejudged me despite his promise to remain impartial until all of the evidence was before the board.

74. Local misguided agents of DIS have fictionalized reports for years and I knew that they were attempting to do the same with me. I took action to assure that I had control of the situation which they reported. Their report of my actions, abilities, and conduct is highly fictionalized.

THE IMPACT OF DEFENDANTS' ACTIONS ON ME

75. I have been painted in a false light.

76. I have to overcome bias, prejudice, and preconceived ideas concerning my abilities, character, and reputation solely as a result of a false police report and the ensuing process and the confidential information summary reports illegally obtained by DIS agents.

77. I have been harmed and my family has been harmed by the fictionalized reporting of information, and the unauthorized dissemination into the military records and the board of inquiry process have resulted in severe infringement of

privacy; the illegal search and seizure of confidential information; and the denial of due process.

78. I have spent a lifetime of study, preparation, and overcoming obstacles so that I can be of future service to our country.

79. I will loose a valuable property interest if my status as a United States Marine is adversely changed as a result of the actions of wayward DIS agents whose stated intent it was to ruin the careers and security clearances of anyone who got in their way of trying to close Honeywell down and costing Honeywell 30 million dollars.

THE DEFENDANTS HAVE VIOLATED MY CIVIL RIGHTS

80. The Department of Defense is the employer of the Secretary of the Navy, the Commandant of the Marine Corps, and the employees of the Defense Investigative Service.

81. The Department of Defense either directed or permitted or failed to stop illegal investigations on me, failed to stop fictionalized report on me, and failed to exercise proper controls over highly confidential and offensive reports on me which were wholly inconsistent with the statements of all the other witnesses. TAB AI and AJ.

82. Defense Investigative Service employees of DOD, began a cover-up of their actions after divulging that they were going to close Honeywell down. TAB M and N.

83. Defense Investigative Service employees of DOD intentionally invaded my privacy and set upon a course to cause me considerable harm. TAB AD and AG.

84. Defense Investigative Service employees of DOD intentionally set out to destroy my character, reputation, and military career.

I WILL BE IMMEDIATELY AND IRREPARABLY HARMED IF PRELIMINARY RELIEF IS NOT GRANTED

85. Senator Nunn has asked for a report from the Marine Corps. TAB AK.

86. I am in a non-pay, non-drilling status.

87. If I am reduced in grade based on this process which was perverted by DIS, I will be irreparably harmed.

88. If I am retired based on this process which was perverted by DIS, I will be irreparably harmed.

89. If I am discharged without retirement pay based on this process which was perverted by DIS, I will be irreparably harmed.

90. DIS threatened to see to it that I was retired and that my career was ruined because I interfered with their stated intent of closing Honeywell down again and costing Honeywell another 30 million dollars.

91. The unclean hands of DIS have tainted the process, denied me of a fair and impartial hearing, and threaten to cause me irreparable harm.

BALANCING OF THE EQUITIES

92. DIS has violated my Constitutional rights and set out upon a course to have me retired from the Marine Corps since I heard DIS agents say that they were going to close Honeywell down.

93. My record, except for an alleged harassing letter, designed to trap DIS agents is exemplary. TABS A THRU L, P THRU Z.

94. All matters concerning the false police report and the ensuing process have been decided in my favor and the record has been ordered expunged. TAB AN.

95. The Marine corps lost the initial exculpatory letter informing them that I was experiencing problems with DIS but then sent on all of the information to start the board process. TAB AC.

96. The Marine Corps could never furnish the standards of leadership to which I was held accountable and had to demonstrate that I had conformed while defending

myself against unauthorized DIS actions. TAB AI.

97. DIS compiled two unauthorized and fictionalized reports on me and then unlawfully disseminated them to at least one member of the formal board hearing which recommended my retirement and reduction in grade. TAB AG, AI, AND AJ.

98. I took an exculpatory polygraph to demonstrate the initial police report was false and that I was proceeding in good faith. TAB AN.

99. DIS did not provide me with requested information for 5 critical months due to administrative error at a time when I needed the information to protect the record. TAB AD THRU AF.

100. For twenty years of my life, I have studied and prepared for leadership positions in the Marine Corps from which to lead Marines, assist and support Marines and their families, protect the country, and provide cost effective

results for the United States Government and the United States Marine Corps. TABS A thru I and P thru A.

101. To reduce, retire, or discharge me before I can have the requested information is a further abuse of my Constitutional right to property and a denial of due process.

102. The Marine Corps has invested considerable time and money in assuring that I am well educated, effective, and capable of assisting Marines, their families, and the Corps to fulfill its responsibilities to the country and the taxpayers. TAB P, R, W AND X.

103. My client and I were the only ones capable of standing up to wayward DIS agents and as a result, Honeywell was not closed again and Honeywell did not lose another 30 million dollars. TAB J.

104. I produced the "Uncommon Valor was a Common Virtue" video tape at a cost of $500.00 whereas I am told that similar

projects for the Marine Corps run into six figure costs. TAB Q and AH.

105. There is no harm to the Marine Corps or the United States government from my continued service pending the USMC report to Senator Nunn as I am in a non-pay status, not drilling, and continuing my education to be better qualified for future leadership positions.

106. The harm to me is immediate, irreparable, and diminishes my creditability and reputation and ability to testify against the wayward DIS agents. TABS AI thru AL.

PUBLIC INTEREST FAVORS PRELIMINARY RELIEF

107. The harm to the taxpayer and the defense industry is great if my character and reputation and ability to testify against the wayward DIS agents is diminished.

108. In times of tightened budgets, unstable world conditions, and reduced manpower mandates, the United States Government and the taxpayers will lose from my

premature retirement, reduction, and discharge.

109. In times of tightened budgets, unstable world conditions, and reduced manpower mandates it is essential to weed out the right people and I am one who has earned the right to continued service to the Corps and my country.

110. In less than a morning, I have favorably resolved problems that have taken an organization an entire week to fail to resolve. TAB U.

111. In times of budget constraints and uncertainties facing the armed services, the taxpayers of the United States will demand Marine leaders who can cut through the bureaucracy and provide valuable services in a cost effective manner.

> "To describe Colonel Fuller as a great leader would be an understatement. In addition to the quality of standards he exemplified, he was a leader that was genuinely concerned with this troops and <u>always</u> went that "extra mile". . . .I spent an entire week attempting to get paid with assistance of my

parent command (LSSS), to no avail. ...He, (Col. Fuller), immediately arranged to obtain authorization...this was all accomplished in one morning after a solid week of rejection. It is difficult to convey my true appreciation for Colonel Fuller's leadership, but he truly is among the best." Sgt. Roxanne L. Roberts, USMC. TAB U.

"He impressed me as being an outstanding professional officer. I especially liked the way that he followed up on matters when they appeared to be bogged down in a bureaucratic bottleneck." MGen B. H. Pochyla, U.S. Army (Ret.) TAB V.

112. I am asking that there be some sense of balance in this process, that the Secretary of the Navy and the Commandant of the Marine Corps conform with their own regulations, that they afford me a hearing which conforms with due process, and that the board members only consider those matters appropriately before them, and that the DIS agents be restrained from interfering with the normal hearing process, refrain from fictionalizing reports, and refrain from the illegal dissemination of reports. TAB *

113. As a result of professional responsibilities and a pledge to my client, I stood alone and with him to stop the wayward actions of a few misguided federal officers intent on wrongfully closing Honeywell down and costing Honeywell another 30 million dollars.

114. I am in a non-pay status and have not drawn a regular reserve drilling paycheck from the United States Marine Corps Reserve since 1982.

115. Given my track record of accomplishments, Marines and their families and the taxpayers of the United States will benefit from my continued and cost effective service. TABS

116. The Secretary of the Navy should wait a little bit. I want the Commandant of the Marine Corps to respond to Senator Nunn's request for the report. I want administrative due process and to be provided with requested information and I

want a hearing which only considers evidence properly before the board. It would be nice to have board members with some degree of administrative temperament and balance.

117. There are many fictionalized reports that have been written by DIS agent Bob Turay which are causing continued and irreparable harm to many people. TAB M.

118. Given the evidence of alleged white collar crime by DIS agents in violation of 18 USC 1001, harassment by DIS agents of defense industry workers in the workplace, and the attempts to close and injure a defense contractor through its employees, this matter is in the public interest.

PROBABILITY OF SUCCESS

119. I have prepared a Petition for expungement of my records held by the United States Marine Corps because they contain evidence of a false police report upon which there was no arrest, I

provided a timely exculpatory polygraph demonstrating there was no deception is saying the police report was false, all issues in that matter have been resolved in my favor, and the State court has Ordered the record expunged.

120. Solely on the basis of that false police report the Marine Corps did, without also forwarding the letter of notice that DIS was causing me considerable problems, initiate a formal board of inquiry.

121. As a result of the false police report and the illegally created and fictionalized report which was not formally before the board of inquiry, the board did makes its recommendation to retire me and reduce me in grade.

122. I am entitled to have the record expunged as there is a Constitutional right to privacy which has been severely invaded and eroded.

123. The verified Complaint filed herein sets forth sufficient factual basis for the

issuance of a permanent injunction, ordering the Marine Corps and the Department of the Navy to produce leadership standards and to conform with their own regulations and the United States Constitution to assure procedural due process.

124. The verified Complaint filed herein sets forth sufficient facts for a determination to be made the process afforded to Plaintiff did not conform to the requirements for procedural due process.

FURTHER, YOUR AFFIANT SAYETH NOT.

Dated: March 11, 1992.

_____
Don B. Fuller

This Affidavit contains Tabs A thru Z and AA thru AP.

Subscribed to and sworn
before me this _____
day of March, 1992.

_____
Notary Public

APPENDIX D

AFFIDAVIT OF GARY FISH

STATE OF MINNESOTA
COUNTY OF HENNEPIN

NOW COMES YOUR AFFIANT, Gary Fish and after being sworn states as follows:

1. That I have worked closely with Don Fuller on Marine matters since September, 1989. I served in the Marine Corps and am a combat veteran. I have attained an MBA and am actively involved in the computer industry.

2. I have observed in Don Fuller a man of extraordinary intensity, vision, and ability to get results.

3. Don Fuller has been a houseguest and he has been actively involved in some of the Scouting programs which I initiated and he sponsored through the local family council.

4. I am familiar with the requirements for being a senior officer in the United States Marine Corps and I have always found Don Fuller to be quite able to

perform the duties of a Marine Corps Officer at any level.

5. Don Fuller possesses a high degree of tact and diplomacy and he is able to provide exceptional attorney representation to his clients.

6. I am personally aware of the great struggle that Don Fuller had to endure in order to sit through the bar examination in Minnesota during February, 1990, and I know that the director of the bar preparation course called Don Fuller's approach to the study for the bar examination the most focused in Minnesota in 17 years.

THE DIS EPISODE CONCERNING DON FULLER IS OVER

7. I know that Don Fuller always kept the DIS harassment of his clients in perspective and that Don Fuller only reported facts as they were related to him by his clients.

8. That I am aware that Don Fuller has won all of the cases involving individuals who were being investigated by DIS.

9. That I am aware that DIS continually boasted that they were going to get between 40 and 70 indictments but as a result of the investigation by Don Fuller - there were no indictments and in fact the grand jury process was halted and a letter was issued from the United States Attorney stating that there would be no indictments of the clients Don Fuller was representing.

10. That I have become aware that DIS routinely started illegal investigations just to harass and abuse defense contractor employees in the Twin Cities.

11. I have been informed by local credible witnesses that DIS targeted Don Fuller just because he was effectively representing his clients and drawing attention to the DIS abuses.

12. That I am also aware that Don Fuller heard Defense Investigative Service Agents Lee Sampson and Brad Bennett state that DIS was going to close Honeywell down again and cost Honeywell another 30 million dollars.

13. That I was informed that DIS issued a threat to a former DIS agent, Greg Bourne, that it Greg Bourne continued to cooperate with Don Fuller in the investigation designed to protect Don Fuller's clients from grand jury indictment. I understand that it is a crime to interfere with an obstruct justice even though it was being done by DIS agents.

14. That I have read Greg Bourne's statement and know that he received the threat of personal and or professional harm from a DIS agent and that former DIS agent Greg Bourne still worries about retaliation from DIS.

15. That I have been told that solely because Don Fuller represented clients being investigated by DIS did Don Fuller become the target of unusual and illegal interest by DIS.

16. I know that DIS agents intentionally tried to and did interfere with the attorney client relationship existing between Don Fuller and his clients.

17. I have been told by credible witnesses who were familiar with DIS that DIS intended to see Don Fuller retired from the United States Marine Corps and that they were going to include the physical disability and mental disability process to force Don Fuller from the Corps so that he would give up on the investigation of DIS.

18. I have personal knowledge that Don Fuller purposely and unselfishly put his Marine Corps career at risk so that DIS would then concentrate on Don Fuller and so that his clients were granted some ere

would be emotional relief as the DIS agents focused on Don Fuller's clients and began to leave Don Fuller's clients alone. I know that Don Fuller purposely decided to become the lightening rod and absorb the harassment DIS intended instead for his clients.

19. I am aware that even despite Don Fuller's efforts, one of his clients still urinates blood as a result of the stress and strain which was put on him by the DIS investigation.

DIS AGENT LEE SAMPSON

20. That during the course of events, I was informed by an Army PSYOPS unit sergeant major and others in that same unit that there were continuing investigations concerning the misconduct of Army Reserve Captain/DIS Agent Lee Sampson which concerned criminal misconduct by Lee Sampson before and during the Persian Gulf crisis.

21. That I am aware that Don Fuller had an attorney responsibility and a responsibility as an officer of the Marine Corps to turn in information concerning the illegal and criminal actions of DIS agent Lee Sampson.

22. That I know that when the required reports were made, Don Fuller suffered more retaliation from DIS.

23. That during the early part of the summer of 1991, I was informed by Tom Boland that the Defense Investigative Service intended to see to it that Don Fuller was retired from the United States Marine Corps Reserve.

24. That I was informed that the method which the Defense Investigative Service intended to use to cause Don Fuller to be separated from the Marine Corps was three fold and included the administrative separation process.

25. I know that the first two methods chosen by DIS to separate Don Fuller from the Marine Corps failed.

DON FULLER RESPONSE

26. Don Fuller has kept me informed of the process leading up to this hearing and I have met with him on a weekly basis during the entire course of this matter.

27. At all times I have observed Don Fuller actively providing a defense for his clients and protecting them from any DIS abuse, I have observed Don Fuller living a full and complete life and contributing to the community, and I have observed Don Fuller keeping all things in perspective.

28. DIS simply singled Don Fuller out for professional and personal harm because he was an effective attorney who was frustrating the confirmed DIS illegal desire to try to indict innocent people in the Twin Cities.

29. I have watched Don Fuller react to each form of DIS retaliation which has been

directed toward him and I have seen him "stand tall" and represent strong moral courage and unbelievable dedication to his Country and Corps with one of the purposes being that no other person ever has to endure such an excoriating experience.

30. In February 1989, I am aware and was informed that Don Fuller's life was threatened by Army Reserve Major Gary Talbot who shares office space with Don Fuller. I know that Gary Talbot told Don Fuller that he did not know who he was messing with and that they would see him killed.

31. I know that Gary Talbot told Don Fuller that if he did not back off of the investigation of the DIS agents and the involvement of the local Army Reserve PSYOP officers in the illegal import/export of arms, that he would be snippered as he sat in his office.

NOT AN ISOLATED CASE

32. During the course of this whole matter, I was told by knowledgeable people other than Don Fuller that it was best that I back out of the matter since it could involve harm to me and to my family.

33. Rather than back out, I became incensed and worked even harder to provide information and to get to the truth.

34. I am aware that Great Lakes Naval personnel have called Don Fuller delusional about the actions of DIS.

35. I have had a phone conversation with Charlie Harmon in Senators Nunn's office and he has informed me that Don Fuller's case is not unique that these cases are popping all around the country, that this is a systemic problem, and that the lid is going to blow off of this thing.

36. I am personally familiar with the cases of Jeff Soholt and Barb Henry who were the first clients of Don Fuller and I know that simply because Don Fuller was representing them and exposing the DIS

wrongdoing did DIS target Don Fuller for harm.

37. I am familiar with the case of Orlando Helicopter and Fred Clark in Orlando Florida and John Cotterham in Huntsville, Alabama and believe that together there are approximately 300 people now out of work and two businesses closed due to DIS/DCIS official and/or criminal misconduct.

38. I am familiar with the case of Theodore Postal in Boston, the Patriot Missile critique who stated that he received a high level of official abuse from DIS/DCIS. I know that the Boston regional director of DIS has been removed and that the DCIS agent in Orlando, Florida is now gone, and that the DIS Field Chief in Minneapolis and some of his misguided subordinates have also left DIS.

39. Much of the information which is stated herein was gathered through personal

observation, interviews with Congressional staff officials, and also much of it is now in the public domain as a result of the Dan Rather inquiry, the U. S. News and World Report articles, and the Space and Aviation.

DON FULLER'S STRONG WILL AND FITNESS FOR CONTINUED SERVICE

40. I have not witnessed one element or indication of physical or emotional weakness of Don Fuller during this entire episode.

41. I have seen in Don Fuller a Marine Corps officer of exceptional ability, an officer who would give up his career so that his clients were protected, and an officer who would give up his live for others.

42. To me, Don Fuller demonstrates that moral and personal courage which we enlisted Marines look for in our Marine officers.

43. As a combat veteran, I know for certain that I would want Don Fuller to lead me

in combat and I would trust members of my family to him if they too were headed to combat.

FURTHER, your affiant sayeth not. Dated December _____, 1992.

_____
Gary Fish

Subscribed to and sworn before me this _____ day of December, 1992.

_____
Notary Public

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

DON B. FULLER

Plaintiff and Petitioner

vs.

THE SECRETARY OF DEFENSE OF THE UNITED STATES; et al

Defendants and Respondents

AFFIDAVIT OF JEFFREY D. SOHOLT

STATE OF MINNESOTA
COUNTY OF HENNEPIN

JEFFREY D. SOHOLT, after being duly sworn, deposes and says for his Affidavit in the above referenced matter:

1. I became acquainted with Don Fuller in October, 1988 after referral from a trusted co-worker.

2. I entrusted Mr. Fuller with my reputation, career and as my representative in a matter involving a Defense Investigative Service investigation over matters in which all issues have been resolved in my favor.

3. My first impressions, substantiated by continued observation over the past 3 years, was that Mr. Fuller is intelligent, articulate, obviously calculated, with high moral standards and a man who demonstrates definite organizational skills.

4. Members of the Defense Investigative Service used methods inconsistent with Constitutional safeguards, tactics designed to intimidate me, and they caused me to temporarily have my security clearances revoked, and they did things to threaten my job and career.

5. Early on in the course of the representation, I asked Mr. Fuller if he was aware of what I considered to be the potential for his personal risk in representing me.

6. I asked Mr. Fuller if I could count on him or the duration of the process to clear me of all allegations and to

restore my security clearances and my good standing with my employer.

7. Mr. Fuller positively stated tat I could count on him. His response was neither boastful nor meaningless talk. He said he was aware of the risks.

8. Mr. Fuller proceeded to systematically review my situation, investigate related items, formulate my case strategy, identify and incorporate additional legal resources when required, and finally after more than three years and countless setbacks, managed my case to a successful conclusion on multiple fronts simultaneously.

9. DIS had told me that I wold not come out of this process since I could not afford to hire an attorney to fight back and that made too much money to rate a public defender.

10. I am informed and believe that a DIS agent had told a person cooperating with Mr. Fuller that DIS was going to obtain

40 to 70 indictments in their investigation. To date they have obtained none.

11. I am informed and believe that DIS agent Olson threatened former DIS agent Greg Bourne with harm if he continued to cooperate with Mr. Fuller in his investigation to prepare a defense and to provide information to the U. S. Attorney involved in the grand jury process.

12. As a management level security professional in a Fortune 100 company, I frequently have the opportunity to deal with people of high intelligence and high character.

13. I find Mr, Fuller's intelligence and character of the highest standards, and his perseverance unmatched.

14. Mr. Fuller has been a cornerstone for me during this process.

15. Mr. Fuller was able to provide me emotional shelter while I was enduring a very unusual DIS investigation.

16. DIS agents contacted me to try to gain personal information about Mr, Fuller at a time that they were investigating me.

17. DIS agents while investigating me, began in investigation on Mr. Fuller.

18. Since October, 1988, I began meeting with Mr. Fuller daily, then weekly, and recently approximately every other week. I have always found him to be the pinnacle both intellectually and ethically.

19. Donald Fuller held my future in his hands for three years with my continued consent.

20. I would entrust Mr. Fuller, without any reservation, in any matter of utmost importance to me personally, and will enthusiastically recommend him to others of high character.

FURTHER YOUR AFFIANT SAETH NOT.

_____
Jeffrey D. Soholt

Subscribed and sworn to before me this _____ day of March, 1992.

_____ Notary Public

APPENDIX F

AFFIDAVIT OF FRED P. CLARK

STATE OF FLORIDA

CITY OF ORLANDO

NOW COMES YOUR AFFIANT, Fred P. Clark and after being sworn states as follows:

1. That I am the Founder, Owner and President of Orlando Helicopter Airways, Inc.
2. That I have been in business for 28 years.
3. That as a result of an abusive and harassing investigation which began when a whistleblower contacted DCIS, Orlando Helicopter Airways, Inc. has now ceased doing business.
4. That during the course of the process we underwent 9 separate investigations.
5. That during the course of the investigation a DCIS agent illegally impersonated a FBI agent and did many other illegal actions which I documented and set forth in an article in Aviation

Week and Space Technology of March 2, 1992. Exhibit 1.

6. That during the course of the investigation, our family home was illegally surveilled and I took pictures of the van and the individual. Exhibit 2.

7. That as a result of contacts with Don Fuller, he informed me how to go about the process of asking that the U. S. Attorney issue a formal letter stating that there would be no prosecution.

8. I am informed that the issuance of a formal letter from the U. S. Attorney's office is a seldom done procedure and that Don Fuller's client and Orlando Helicopter Airways, Inc. are the only individuals and or companies to receive such a formal declaration of no further prosecutorial process.

9. The plight of Orlando Helicopter Airways, Inc. was shown on Dan Rather, CBS News on July 9, 1992. Exhibit 3. Videotape.

MINNEAPOLIS SITUATION

10. After first talking with Don Fuller, I contacted two former DIS agents, Lee Harriman and Greg Bourne on March 17, 1992, Both men were still concerned that they might suffer retaliation from DIS.

11. Both former DIS employees substantiated that DIS Field Chief Bob Turay had changed the professional defense contractor landscape upon his arrival in the Twin Cities and that certain companies and or individuals were purposefully targeted for investigation with Turay's guidance to "find something".

12. Both former DIS employees stated that Don Fuller had been through a lot in representing his clients and that he had been resisting all DIS attempts to gain leverage.

13. Bruce Harriman was personally knowledgeable that Minneapolis defense contractor employees were illegally

investigated by DIS and such illegal actions included illegal surveillance, people being followed, and that reports were intentionally fabricated to support the DIS case.

14. Bruce Harriman stated that the reports by Fuller that windows were broken and that cigarette piles were left by his windows are absolutely true and consistent with what the others were suffering in Minneapolis.

15. Bruce Harriman had not wanted to move from the Twin Cities but he feared for his professional career as he personally knew that Bob Turay had destroyed many lives and careers.

16. Bruce Harriman related to me that one woman defense contractor employee lost her baby one day after a "tongue lashing" by Bob Turay.

17. Bruce Harriman stated that he believed that Don Fuller's client, Jeff Soholt had

aged about 15 years in the year years that he was a victim in this DIS ordeal.

18. Bruce Harriman stated that DIS Field Chief and others had committed crimes that they had not had to yet pay for and that the heavy harassment began in the Twin Cities during the summer of 1987. Bruce Harriman stated that it had really heated up during June and July 1988.

19. Greg Bourne stated that DIS can and will create things that did not happen. When Greg Bourne left DIS in 1988 things really got bad and there were some very odd and strange things that happened at DIS and to people.

20. I remain deeply concerned that DIS and or DCIS can begin a process and target a company or individual and then commit crimes during the investigation process of such a nature that a company like mine and a career like Don Fullers are so badly hurt.

21. It takes a great deal of moral courage, financial resources, and determination to stand up to such an organized abusive process.

22. I have talked with Don Fuller on numerous occasions since March, 1992 and I have come to know that he has effectively spared his clients from any indictment and that the abusive techniques described by former DIS agents Harrimana and Bourne and Harriman and attributed to DIS Field Chief Bob Turay have ceased.

23. I have been informed that DIS Field Chief Bob Turay is no longer employed by DIS.

FURTHER YOUR AFFIANT SAYETH NOT. Dated this _____ day of December, 1992.

_____
Fred P. Clark

Subscribed to and sworn before me this ____day of December, 1992.

_____
Notary Public

APPENDIX G

UNIFORM CODE OF MILITARY JUSTICE

10 USC 801

Article 134 - The General Article

Though not specifically mentioned in this chapter [10 USC 801 et seq], all disorders and neglects to the prejudice of the good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter [10 USC 801] may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

APPENDIX H

SECNAVINST 1920.6A

Administrative Separation of Officers

Definition:

Board of Inquiry. A board convened to receive evidence and make findings and recommendations as to separation for cause and characterization of service under this instruction in the case of an officer.

Policy Governing Involuntary Separation.

1 a. **Substandard Performance of Duty**. Inability of an officer to maintain adequate levels of performance or conduct as evidenced by one or more of the following:

(1). Failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade.

1 b. **Misconduct**. Performance or personal or professional conduct which is unbecoming an officer as evidenced by one or more of the following reasons:

(1) Commission of a military or civilian offense which, if prosecuted under the UCMJ, could be punished by confinement of six months or more, and any other misconduct which, if prosecuted under the UCMJ, would require specific intent for conviction.

APPENDIX I

MARCORPSEPMAN

MCO P 1900.16

Administrative Separation of Officers For Cause

Definition:

Board of Inquiry. A board convened pursuant to paragraph 4302 to receive evidence and make findings and recommendations as to whether an officer who is required to show cause for retention on active duty should be retained on active duty.

Policy Governing Involuntary Separation.

4103 1. **Substandard Performance of Duty**. Inability of an officer to maintain adequate levels of performance or conduct as evidenced by one or more of the following:

4103 1 a. Failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade.

4103 2. **Misconduct**. Performance, personal or professional conduct which is unbecoming an officer as evidenced by one more of the following reasons:

4103 2 1. Commission of a military or civilian offense which, if prosecuted under the UCMJ, could be punished by confinement of six months or more, and any other misconduct which, if prosecuted under the UCMJ, would require specific intent for conviction.

APPENDIX J

Appendix J Contains a Request for Admissions Served on AUSA Robert Small to be Answered by Admiral Frank Kelso who was then Acting Secretary of the Navy. Requests for Admissions Were Also Prepared for the Commandant of the Marine Corps and The Secretary of Defense.

The Requests Contained Admissions that AUSA Robert Small and Navy Lieutenant Alicia Connolly had Submitted False and Misleading Personnel and Medical Records to the United States District Court.

Robert Small and Alicia Connolly Moved for a Protective Order to Stop Discovery.

The District Court Judge Saw Nothing Wrong with the Actions of the AUSA or the Navy Lawyer.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

DON B. FULLER

Plaintiff and Petitioner

Civil Action 4-92-233

vs.

PETITIONERS
REQUEST FOR ADMISSIONS
SERVED ON THE
SECRETARY OF THE NAVY
ON MARCH 25, 1993.

THE SECRETARY OF DEFENSE, et al

Defendants and Respondents

REQUEST FOR ADMISSIONS

TO: THE SECRETARY OF THE NAVY, c/o his/her Attorney, Mr. Robert Small, Assistant United States Attorney, Room 234, United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401.

PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 36, you are requested to admit the truthfulness of the following matters.

Unless you serve upon the Petitioner your answers to the request for admissions within

30 days after service upon you of the request, then each such matter is taken as admitted.

If objection is made, the reasons therefore shall be stated.

Mr. Secretary, you are requested to admit the following:

REQUEST FOR ADMISSIONS OF THE SECRETARY OF THE NAVY

1. That you are the Secretary of the United States Navy.
2. That you have reviewed the Tailhook Investigation Report.
3. That you are not releasing to the public the Tailhook Investigation Report.
4. That the Tailhook Investigation report is critical of your conduct as Chief of Naval Operations.
5. That the Tailhook Investigation report is critical of your actions in obstructing the Tailhook investigation.
6. That you are concerned that the release of the Tailhook investigation would adversely affect the budget process by

which the United States Navy obtains funds for its operation.

7. That the Tailhook Investigation implicates the former Judge Advocate General of the Navy in the cover-up of Tailhook.

8. That the Tailhook Investigation implicates the former Director of the Naval Investigation Service in the cover-up of Tailhook.

9. That more than 5 Navy Admirals are implicated in the cover-up of Tailhook.

10. That Tailhook occurred in a civilian community and not on Navy Department or United States Government Property.

11. That Tailhook occurred during off-duty hours.

12. That Tailhook was not an officially sponsored Navy Department function.

13. That your own actions, if any, <u>in the Tailhook cover-up</u> took place while you were acting in an official capacity.

14. That the actions of any Navy Admirals involved in the Tailhook cover-up occurred while they were acting in their official capacities.

15. That you took no action to discharge yourself as a result of your actions in covering-up Tailhook.

16. That you have taken no action to discharge each and all of the Navy Admirals involved in the Tailhook cover-up.

17. That a former Secretary of the Navy was H. L. Garrett III.

18. That H. L. Garrett III was at the Tailhook incident and plucked beer.

19. That H. L. Garrett III initially failed to properly report that he was at Tailhook.

20. That H. L. Garrett III committed and or witnessed an act of sodomy at Tailhook as follows:

20A. witnessed sodomy before beer plucking.

20B. witnessed sodomy after beer plucking.

20C. witnessed sodomy at any time while the Secretary of the Navy was at Tailhook.

20D. H. L. Garrett III committed an act of sodomy before beer plucking.

20E. H. L. Garrett III committed an act of sodomy after beer plucking.

20F. H. L. Garrett III committed an act of sodomy at any time while the Secretary of the Navy was at Tailhook.

21. That you cannot determine whether H. L. Garrett III is telling the truth about whether the former Secretary did or did not sodomize or witness sodomy at Tailhook.

22. That H. L. Garrett III was the Secretary of the Navy at the time that the Office of the Secretary of the Navy made the determination to discharge Marine Colonel Don Fuller in February, 1992.

23. At the time that the Secretary of the Navy made the decision to discharge Marine Colonel Don Fuller, The Secretary of the Navy had not properly reported

that H. L. Garrett III was at Tailhook, that H. L. Garrett had beer plucked, and whether H. L. Garrett III had knowledge of sodomy at Tailhook.

24. That you maintain the official medical records of Marine Colonel Don B. Fuller.

25. That the medical records of Marine Colonel Don B. Fuller state that Marine Colonel Don B. Fuller was not physically qualified for duty as a United States Marine during each of the following months, in 1988 (March through December); in 1989 (from July though December); in 1990 from (March through October 30); in 1992 (from March through December 15, 1992).

26. That Marine Lieutenant Colonel Don B. Fuller was found physically qualified for duty by a physical evaluation board on October 30, 1990.

27. That Marine Colonel Don B. Fuller was found physically qualified for duty by a

physical evaluation board on December 15, 1992.

28. That Marine Colonel Don B. Fuller submitted a rebuttal to a Summer of 1992, Great Lakes medical board finding of not qualified for duty.

29. That you have a copy of the medical board rebuttal submitted to the Commanding Officer, Great Lakes Naval Hospital during August, 1992.

30. That you have the complete records submitted to the physical disability hearing board on December 15, 1992.

31. That you have the complete findings, including the enclosure, of the physical evaluation hearing board on December 15, 1992.

32. That Navy Lieutenant Alicia Connolly, JAG, is an active duty Naval Officer.

33. That Navy Lieutenant Alicia Connolly, JAG, submitted documents to the United States District Court of the District of Minnesota on March 3, 1993, which did not

include the full and complete medical records and reports of Marine Colonel Don B. Fuller.

34. That Navy Lieutenant Alicia Connolly, JAG, submitted documents to the United States District Court of the District of Minnesota on March 3, 1993, which did not include the full and complete medical records from the Navy Physical Evaluation Hearing Board of December 15, 1992.

35. That Navy Lieutenant Alicia Connolly, JAG, has professional malpractice insurance coverage.

36. That Navy Lieutenant Alicia Connolly, JAG is a licensed attorney in the states of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North

Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and the District of Columbia.

37. That the official military records of Marine Colonel Don B. Fuller as maintained by the United States Marine Corps set forth a period of active duty service in which Don Fuller served on active duty with the United States Marine Corps from at least October 15, 1983 until September 30, 1986.

38. That the military records of Marine Colonel Don B. Fuller which were submitted to a United States District Court for the District of Minnesota on March 3, 1993, did not contain any reference to the active duty served by Marine Colonel Don B. Fuller for the period of at least October 15, 1983 until September 30, 1986.

39. That the Department of the Navy has copies of a Confidential ("DIS") report July 31, 1990 and numbered (90208-DL1-3230-2A1).

40. That the Confidential ("DIS") report July 31, 1990 and numbered (90208-DL1-3230-2A1) was obtained without any authorization from Marine Colonel Don B. Fuller.

41. That the Confidential ("DIS") report July 31, 1990 and numbered (90208-DL1-3230-2A1) was obtained at a time when Don Fuller did not have any government granted security clearance and at a time that Don Fuller was not physically qualified for duty as a United States Marine.

42. That the Confidential ("DIS") report July 31, 1990 and numbered (90208-DL1-3230-2A1) was obtained at a time when Don Fuller had not initiated any request to have a clearance or to have a clearance updated.

43. That the Department of the Navy has copies of a Confidential ("DIS") report ("DIS") report (90208-D11-3230-2A1 Supp) dated August 1, 1991.

44. That the Confidential ("DIS") report ("DIS") report (90208-D11-3230-2A1 Supp) dated August 1, 1991. was obtained <u>without any authorization</u> from Marine Colonel Don B. Fuller.

45. That the Confidential ("DIS") report ("DIS") report (90208-D11-3230-2A1 Supp) dated August 1, 1991. was obtained at a time when Don Fuller did not have any government granted security clearance.

46. That the Confidential ("DIS") report ("DIS") report (90208-D11-3230-2A1 Supp) dated August 1, 1991 was obtained at a time when Don Fuller had not initiated any request to have a clearance or to have a clearance updated.

47. That Confidential ("DIS") report (90208-D11-3230-2A1 Supp) dated August 1, 1991 was made available to at least one member

of the formal board of inquiry in a federal building in New Orleans, Louisiana on September 17, 1991, prior to the board voting to recommend retirement for Marine Colonel Don Fuller from the United States Marine Corps Reserve.

48. That Confidential ("DIS") report (90208-D11-3230-2A1 Supp) dated August 1, 1991 was made available to Captain Collins a member of the formal board of inquiry in a federal building in New Orleans, Louisiana on or before September 17, 1991, and prior to the board voting to recommend retirement for Marine Colonel Don Fuller from the United States Marine Corps Reserve.

49. That Don Fuller has reported to the Secretary of the Navy that on September 17, 1991, in New Orleans, Louisiana, that Don Fuller found an inflammatory, untrue written summary of misguided misrepresentations of Judith K. Dutcher in a public building out in the open and

in plain view of Don Fuller's colleagues, attorneys, and administrative discharge board members.

50. That Don Fuller has objected to the administrative discharge hearing board process leading up the September 17, 1991, hearing in New Orleans, Louisiana for at least the following reasons.

50A. Don Fuller, despite repeated requests, was not provided with the standards of leadership and standards by which his conduct could be measured.

50B. Don Fuller has complained that he had to prove that his conduct lived up to a nonexistent standard and or a higher standard than those still on active duty and who were involved in the Tailhook incident and its cover-up.

50C. Don Fuller has complained to the Secretary of the Navy that he has been held to a higher standard of leadership than the Secretary of the Navy who was at Tailhook and the present Secretary of the Navy, the former CNO Kelso.

50D. Don Fuller has complained to the Secretary of the Navy that he has been held to a higher standard of leadership than the Secretary of the Navy who plucked beer at Tailhook.

50E. Don Fuller has complained to the Secretary of the Navy that he has been held to a higher standard of leadership than the Secretary of the Navy who failed to report his knowledge of the extent of sodomy at Tailhook.

50F. Don Fuller has complained to the Secretary of the Navy that he has been held to a higher standard of leadership than the former and present Secretary of the Navy who have cover-ed up and still continue to cover-up Tailhook.

50G. Don Fuller has complained to the Secretary of the Navy that he has been held to a higher standard of leadership than the Secretary of the Navy who still will not release the Tailhook investigation

50H. Don Fuller has complained to the Secretary of the Navy that he has been held to a higher standard of leadership than the Secretary of the Navy whose actions as CNO are reported as deficient in the Tailhook investigation.

50I. Don Fuller has complained to the Secretary of the Navy that he has been held to a higher standard of leadership than the JAG of the Navy who was permitted to retire with full benefits despite his official criminal actions in the cover-up of the Tailhook investigation and obstruction of justice.

51. That, in practice, the Secretary of the Navy has a different standard of conduct

by which he judges regular and reserve officers of the Naval Service and or the Marine Corps.

52. That the Secretary of the Navy holds Reserve Marine Colonels to a higher standard of conduct than he holds himself.

53. That the Secretary of the Navy holds Reserve Marine Colonels to a higher standard of conduct than he holds active duty Navy Captains and Marine Colonels.

54. That the Secretary of the Navy holds Reserve Marine Colonels to a higher standard of conduct than he holds active duty Navy Admirals and Marine Generals.

55. That administrative discharge board results for the September 17, 1991, hearing for Marine Colonel Don Fuller contain no arrest record, no conviction, and a civilian record upon <u>which all issues were resolved in favor of Don B. Fuller</u>.

56. That Don Fuller has objected to the administrative discharge process of the United States Navy and its Marine Corps for the following reasons:

56A. Don Fuller was not permitted to call requested witnesses and to cross examine those witnesses who had made anonymous phone calls and unverified statements and who had been involved in false reporting and a cover-up.

56B. Don Fuller was denied the opportunity for a more convenient and cost effective forum in Washington D. C. where some of the Don Fuller's character witnesses resided and were present.

56C. The senior member, a Marine Colonel Belknap was inattentive and did not read all of the exhibits nor did he understand the laws of Minnesota relating to the submission of a false police report.

56D. Marine Colonel Belknap was inattentive and out in the halls a lot and did not have the time to properly perform and discharge his duties.

56E. Marine Colonel Belknap failed to take adequate precautions to assure that inflammatory and confidential documents not in evidence were kept from the members of the board.

56F. Marine Colonel Belknap lost his temper and threw his pencil while

Don Fuller was testifying thereby undercutting the testimony and character of the Don Fuller whose word and exculpatory polygraph were the main defense to the false police report submitted by a woman with a history of drinking problems and hallucination.

56G. Marine Colonel Belknap lost his temper and influenced the junior members of the board.

56H. At least one member of the board of inquiry reviewed evidence not presented to the board in the form of the Confidential ("DIS") report (90208-D11-3230-2A1 Supp) dated August 1, 1991.

56I. Confidential ("DIS") report (90208-D11-3230-2A1 Supp) dated August 1, 1991 was in plain view of board members on September 17, 1991, as they passed a book shelf in an open area in the federal building in which the hearing was held.

56J. Despite Don Fuller's request to the appointed defense counsel to protect the record, Don Fuller was told not to be technical, to just get through the hearing, and that and other matters would be brought up on appeal.

56K. Marine Colonel Don Fuller's attorney made statements during closing argument which further impugned the character and reputation of the Don Fuller who had been the only testifying witness against the no-show woman who filed a false police report concerning a contested incident in the civilian community while Don Fuller was in a

no pay status, in a no duty status, in a not physically qualified for duty status, and upon which all matters were resolved in favor of Don Fuller.

56L. The administrative discharge board senior member would not let Don Fuller discuss conversations with General officers of the Marine Corps which conversations contradicted the comments of the person making the false police report and Judith K. Dutcher.

56M. Marine Colonel Don Fuller was unable to receive requested information from ("DIS") before the hearing but which was then erroneously and unlawfully put before the hearing panel.

56N. After the administrative discharge board hearing Marine Colonel Don Fuller was informed that ("DIS") has not provided the requested information for more than 5 months due to "<u>administrative error</u>".

56O. Marine Colonel Don Fuller was informed that ("DIS") has not provided Don Fuller with the information which was illegally before the hearing panel because ("DIS") did not then have that information in their headquarters.

56P. The board considered information regarding the Marine Colonel Don Fuller's actions <u>subsequent</u> to the alleged act of misconduct even though said actions by Don Fuller were explainable and permissible under the Lawyer's Rules of Professional due to the privilege

and requirement of being zealous in the defense of a client.

56Q. The failure to provide the requested DIS information which was in the hands of one board member and in view of other board members has prejudiced the rights of Marine Colonel Don Fuller.

57. That Marine Colonel Don Fuller was informed by the Commandant of the Marine Corps that Marine Colonel Don Fuller had to elect by March 16, 1992 whether to be reduced in grade to Lieutenant Colonel and retired or to be discharged without retirement benefits.

58. That the Secretary of the Navy presently maintains security clearance, medical records, and official military records of Marine Colonel Don Fuller which contain references to the false police report and resulting court action in which all matters were resolved in favor of Don Fuller.

59. That the Secretary of the Navy presently maintains records of Don Fuller which contain the Confidential Information

Summary Reports prepared on Marine Colonel Don B. Fuller by Defense Investigative agents and or former DIS agents, Robert Turay, Lee Sampson, Lee Olson, and DIS agent Haurilick which have been reported to be fictionalized, reportedly are fabricated, and were reportedly illegally and improperly obtained.

60. That Don Fuller has requested the expungement of all records hereinafter held as follows:

THE HONORABLE H. L. GARRETT III

SECRETARY OF THE NAVY

THE PENTAGON

WASHINGTON, D. C.

Expunge all records and data of Don Bedelle Fuller (d.o.b. 1-11-44), along with any portions of files of Defense Investigative reports which are included in any Navy Department and United States Marine Corps DOD personnel report, investigation report, or formal board or

inquiry report and endorsements thereon, or official or other correspondence which contains any of the information included in Defense Investigation Service Information Summary Report (90208-D11-3230-2A1) dated July 31, 1990, and Reports Defense Investigation Service Information Summary Report (90208-D11-3230-2A1 Supp) dated August 1, 1991.

Request the return of all information relating to Don Bedelle Fuller, (d.o.b 1-11-44), from all agencies to which such information has been provided, including but not limited to, The Secretary of Defense, the United States Marine Corps, The Defense Investigative Service, the Federal Bureau of Investigation, and the National Crime Information Center.

Expunge all records and data of Don Bedelle Fuller (d.o.b. 1-11-44), along with any portions of files or criminal history reports stemming from Eden Prairie Police File Nos. 89012943, dated

9-25-89 and 90004276, dated 4-4-90 (D.C. File Nos. 90033312; 90070184), issued in Hennepin County, Minnesota and which were based on an initial false police report. Request the return of all information relating to Don Bedelle Fuller, d.o.b 1-11-44, from all agencies to which such information has been provided, including but not limited to, the Minnesota Department of Public Safety, the Federal Bureau of Investigation, and the National Crime Information Center. The request shall also include a request to expunge all portions of criminal history reports concerning the non-arrest and non-conviction of Don Bedelle Fuller, d.o.b 1-11-44 arising from the initial false police report in which all proceedings were determined in favor of the accused.

61. That you are familiar with and have read the requirements of 18 USC 1001 prior to signing the Answers to the Request for Admission.

62. That you done things during your term of service as the Chief of Naval Operations which were illegal.

63. That you have done things during your term of service as the Chief of Naval Operations or as the Secretary of the Navy which brought discredit to the United States Navy reputation for truthfulness.

64. That you have done things during your term of service as the Chief of Naval Operations or as the Secretary of the Navy which brought discredit to the United States Navy reputation for integrity.

65. That you have done things during your term of service as the Chief of Naval Operations or as the Secretary of the Navy which brought discredit to the United States Navy reputation for candor in dealing with the public.

66. That you have done things during your term of service as the Chief of Naval

Operations or as the Secretary of the Navy which brought discredit to the United States Navy reputation for candor in dealing with victims of crimes committed by naval personnel.

67. That you have committed a crime under the United States Code of Military Justice as a result of your actions or inactions involving the Tailhook investigation.

68. That you have committed a crime under the United States Code of Military Justice as a result of your actions or inactions in failing to release the Tailhook investigation.

69. That by your words or your failure to speak you have misled Congress.

70. That by your words or your failure to speak you have misled America citizens while you were the CNO or the Secretary of the Navy.

71. That you have permitted a Navy Admiral or a Marine General officer to remain on active duty at a time when you have known

but you have failed to properly report that they have committed an offense under the Uniform Code of Military Justice.

72. That you have permitted a Navy Admiral or a Marine General officer to remain on active duty at a time when you have known but you have failed to take all required action to commence the process required by the Uniform Code of Military Justice.

73. That despite your reading of 18 USC 1001, you are continuing to withhold the Tailhook investigation.

Dated: March 25, 1993.

By: Don B. Fuller

Don B. Fuller, Pro Se
570 Minnesota Law Center
Minneapolis, Minnesota
55402
612-332-0938

APPENDIX K

Citations to U.S v. Kelly, United States Navy-Marine Corps Court of Military Review 93-00141 Published 13 June 1994

A case involving the favored status of Yeoman Seaman [YNSM] H. Lawrence Garrett, IV, who was not processed for administrative discharge despite being found guilty of active-duty use of marijuana, larceny of food and gasoline, receipt of stolen property, and soliciting another to steal. YNSN Garrett was son of the then-Secretary of the Navy H. Lawrence Garrett III who was asked to resign his office by President Bush.

Citations from the Court of Military Review Decision

In the case of the son of the Secretary of the Navy, "...the military justice process was infected throughout by senior naval officers who considered the accused rather than what he had done."

"We do find that RADM Williams, due to his close personal relationship with the Secretary, engaged in actions of favoritism towards [the Secretary's son] to such an extent that NIS agents believed he might have been obstructing justice."

"Preferential treatment of a suspect based on his family relationship to a high-ranking officer or civilian has no place in

any reputable justice system." "....the integrity and fairness of the military justice system cannot accept such a result."

The Secretary's son, "...was not processed for administrative discharge following the Article 15 proceeding. Not only is it uncommon, but it is extraordinary that a Sailor could be found to have used marijuana repeatedly, to have stolen property using stolen credit cards taken from a Navy mail room, to have received stolen property by using those cards, to have asked another Sailor to steal a vacuum cleaner by using another Sailor's stolen credit card, and to have lied to NIS agents under oath and then be retained on active duty without being processed for discharge. In this case, that result is not inexplicable. Based on out experience, we state with confidence that, absent extraordinary circumstances, any other Sailor in the U. S. Navy who faced such charges would have been tried by a court-martial.

"In summary, we find that YNSN's transfer was based solely on his status as the son of the Secretary. The decision that his offenses should be disposed of at an Article 15 proceeding and that he would not be processed for administrative discharge thereafter was based on that same status.

APPENDIX L

DEFENSE INVESTIGATIVE SERVICE
1900 Half Street S.W.
Washington, D. C. 20324-1700

February 20, 1992

Mr. Don B. Fuller
570 Towle Building
330 Second Avenue South
Minneapolis, Mn 55401

Dear Mr. Fuller:

On October 1, 1991, we received your request of September 24, 1991, for investigative records concerning you. This response has been delayed due to administrative error. We regret any inconvenience we may have caused you.

Attached is a copy of all documents in this investigative file maintained by the Defense Investigative Service (DIS) concerning you.

We appreciate having been able to serve you in this matter. If you have any questions regarding the contents of your file or the information released to you, please feel free to contact my office.

Sincerely,

DALE L. HARTIG Chief, Office of Information and Public Affairs

THIS IS THE END OF PETITIONER'S APPENDICES

Respectfully Submitted as of October 10, 1994

Don Fuller, Pro Se
570 Minnesota Law Center
Minneapolis, MN 55402
612-332-0938